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No. 91-

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THOMAS G. CLINES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a taxpayer can be convicted of willfully failing to disclose a "financial account in a foreign country" on his federal income tax return and failing to file a report disclosing said interest where the applicable laws, regulations, judicial opinions and tax return instructions are ambiguous regarding the definition of a "financial account" and "financial institution?"

2. Whether Independent Counsel Lawrence Walsh had the legal and constitutional right to prosecute Petitioner for tax violations for failing to disclose a "financial account in a foreign country" as a result of the Independent Counsel's general appointment to investigate certain events of the "Iran-Contra Affair?"

3. Whether a taxpayer who is a citizen and resident of the State of Virginia for 40 years, who has continuously filed returns and forms by mail from his home to the IRS can be tried in the District Court for Maryland for violations relating to his income tax returns and for failing to file related Treasury Forms?

PARTIES TO THE PROCEEDING

Petitioner Thomas G. Clines was the defendant in the district court and appellant in the Court of Appeals.

The United States of America has been represented by the Office of Independent Counsel Lawrence E. Walsh, William M. Treanor and Gregory A. Mark, Associate Counsel.

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PETITION FOR A WRIT OF CERTIORARI

Thomas G. Clines hereby petitions this Court to review the Judgment of the United States Court of Appeals for the Fourth Circuit affirming his convictions for under-reporting gross receipts on his federal individual tax returns and falsely stating on the returns that he did not have an interest in a financial account in a foreign country, and failing to file reports disclosing to the Commissioner of Internal Revenue an interest in a foreign financial account.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit appears in Petitioner's Appendix ("Pet. App.") at ——— and is reported at ———. This decision affirmed the convictions in the United States District Court for the District of Maryland on September

1, 1990. Petitioner was sentenced to 16 months in prison and a fine of $40,000.00.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1992. This petition is timely filed pursuant to Supreme Court Rule 13. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

26 U.S.C. § 7206(1)
28 U.S.C. § 591-598
31 U.S.C. § 5312
31 U.S.C. § 5314(b)
31 U.S.C. § 5322(b)

31 C.F.R. § 103.24
31 C.F.R. § 103.26

STATEMENT OF THE CASE

A. Background and Proceedings.

Petitioner was a functionary in the covert operation orchestrated by The White House which became known as "The Iran/Contra Affair."

Lawrence Walsh, appointed as Independent Counsel, obtained an Indictment of the Petitioner, Thomas G. Clines, from a grand jury in the District of Maryland on January 22, 1990. It charged Mr. Clines with various Income Tax reporting offenses.

Count One charged Mr. Clines with filing a false federal income tax return, Form 1040, for the calendar year 1985, in violation of 26 U.S.C. § 7206(1). Count One alleged that the return was false in two ways: first, that Mr. Clines checked a box on the tax return that he did not have an interest in or authority over a financial account in a foreign country, when he allegedly did have

such interest or authority; and second, by allegedly underreporting his gross receipts for that year. Count Two charged that Mr. Clines' Form 1040 for calendar year 1986 was false in the same two ways.

Counts Three and Four charged violations of 31 U.S.C. § 5314 for the years 1985 and 1986, respectively. Those Counts alleged that for those two years, Mr. Clines knowingly failed to file the report required by § 5314 and the regulations promulgated thereunder, 31 C.F.R. §§ 103.24 & 103.26. Those provisions required the filing of a special Treasury form if the taxpayer had a financial interest in, or authority over, a financial account in a foreign country. The prosecution sought to apply the enhanced punishment provisions of 31 U.S.C. § 5322(b), by also alleging in Counts Three and Four that Mr. Clines violated § 5314 while also violating 26 U.S.C. § 7206(1), as charged in Counts One and Two of the Indictment.

B. The Iran/Contra Enterprise.

This case arose from the organization by Colonel Oliver North, an official of the National Security Council, of an effort to supply military aid to the Nicaraguan "Contras" after Congress shut off official funds for that purpose. Transcript p. 151. In late 1984 or early 1985, Colonel North recruited retired Air Force General Richard Secord to procure and supply arms. Transcript pp. 150-151.[1]

General Secord and Albert Hakim then formed a number of overseas companies to collect the money and pay for the procurement and shipment of the arms. Secord and Hakim accomplished this through a Swiss fiduciary company called Compagnie de Services Fiduciaries ("CSF"), run by Willard Zucker, an American living in Switzerland. Tr. pp. 258-259.

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[1] References are to the transcript of the Trial proceedings, held September, 1990, in the U.S. District Court for Maryland, (hereinafter "Tr.").

Mr. Secord and Mr. Hakim established three companies at CSF that operated as recipients of money to be used to purchase weapons for the Contras. Those companies were Energy Resources International, S.A., Lake Resources, Inc., and Hyde Park Square Corporation. Secord and Hakim also created several additional companies, some of which then were used to distribute and move funds. Those companies were: Albon Values Corporation; Defex, S.A.; Dolmy Business, Inc.; Gulf Marketing Consultants, Ltd.; Stanford Technology Corporation Services, S.A.; Stantech Services, S.A.; Toyco, S.A.; and Udall Research Corporation. Tr. pp. 153-154; 321-322.

These companies were organized under Panamanian, Liberian, or Swiss law. Tr. p. 280. CSF through Zucker, organized these companies on behalf of Secord and Hakim, filing and maintaining the necessary paperwork with the appropriate governments. Then, pursuant to fiduciary agreements between Mr. Hakim and CSF, CSF undertook certain responsibilities in the operation of these companies, under the direction of the owners, Secord and Hakim. Tr. pp. 280-284.

CSF entered into a series of agreements with each of these companies, called "Fiduciary Agreements." Tr. p. 281. CSF opened and managed the only bank accounts for these various companies. Tr. p. 290.

Secord and Hakim used these companies and CSF to arrange the shipments of weapons to the Nicaraguan Resistance, the "Contras."

Secord and Hakim employed a Canadian citizen, Manny Weigensburg, as their agent to procure the arms. Tr. pp. 159-160, Tr. p. 464. When Mr. Weigensburg did not perform satisfactorily, Mr. Secord asked Petitioner, Mr. Clines, to take over that role. Tr. p. 160.

Mr. Clines had spent most of his life serving his country. He had fought with the Army infantry in Korea.

After leaving the Army, Mr. Clines returned to the Central Intelligence Agency, where he worked from 1949 to 1978. He served in operations posts in Europe, the Caribbean, Latin America, Africa, and Southeast Asia.

Mr. Clines agreed with Secord and Hakim that Mr. Clines would receive a percentage of the profit on each shipment, plus expenses. Tr. pp. 161-162. They agreed that Mr. Clines was to be paid as each shipment was completed.

Mr. Clines had nothing whatsoever to do with the creation or registration of Energy Resources, Lake Resources, or any of the other companies Secord and Hakim told CSF to set up. Mr. Clines had no ownership interest in those companies, was neither an officer nor a director of any of them, and had no role in their operations. Tr. pp. 195-198. Mr. Clines was not a party to any of the fiduciary or other agreements between CSF and these companies, nor was he ever specified in those agreements as a person authorized to give direction to CSF. Tr. pp. 281-290.

Mr. Clines had no role in setting up bank accounts for these companies. He had no signatory or other authority over those accounts. Tr. pp. 290-297.

As each Phase was completed, Secord and Hakim calculated the profit to be divided among them and Mr. Clines based on the agreed percentages. Tr. p. 464. Mr. Clines did not calculate that figure, nor decide when to distribute the funds. Tr. p. 1207. Secord and Hakim made those decisions by telling CSF what the profit distribution was to be, and authorizing CSF to make it. CSF then debited the ledger of whichever one of the companies was to be making the payment to whatever creditor and simultaneously credited a bookkeeping entry on the same company's ledger in the name of each person sharing in the distribution, an entry that Mr. Zucker said CSF referred to as that person's "capital account." Tr. 464-465.

Mr. Clines did not file a Treasury Form 90-22.1 for 1985 or 1986, which would have been the correct government form to report authority over a "foreign account" in a foreign financial institution. Nor did he check the "Yes" box on Schedule B, Part III, Question 11, of Mr. Clines Form 1040 in either year disclosing a "foreign account." The Independent Counsel had him indicted for those alleged offenses. The grand jury also charged that his Form 1040, Schedule C, falsely reported his gross receipts for 1985 and 1986. Though Mr. Clines resided in 1985 and 1986 in Virginia (as he had for forty (40) years, and does today), the prosecution obtained the indictment in the District of Maryland. Mr. Clines filed motions attacking the legal sufficiency of the Indictment, the venue of the trial and the authority of the Independent Counsel to prosecute these charges. All such motions were denied.

C. Reporting Requirements.

The requirement to report information about foreign financial accounts stems from 31 U.S.C. § 5314. That provision instructed the Secretary of the Treasury to require a citizen of the United States "to keep records, file reports, or keep records and file reports, when the . . . citizen . . . makes a transaction or maintains a relation for any person with a foreign financial agency." The statute specified generally what types of information the Secretary must obtain, and allowed the Secretary discretion with regard to certain other categories of information. 31 U.S.C. § 5314(b).

Section 5312 defines certain terms for purposes of applying § 5314. It defines "foreign financial agency" and then further defined "financial agency" and "financial institution" as follows:

> (2) 'financial institution' means—
>
> > "(A) an insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)));

"(B) a commercial bank or trust company;

"(C) a private banker;

"(D) an agency or branch of a foreign bank in the United States;

"(E) an insured institution (as defined in section 401(a) of the National Housing Act (12 U.S.C. 1724(a)));

"(F) a thrift institution;

"(G) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.);

"(H) a broker or dealer in securities or commodities;

"(I) an investment banker or investment company;

"(J) a currency exchange;

"(K) an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments;

"(L) an operator of a credit card system;

"(M) an insurance company;

"(N) a dealer in precious metals, stones, or jewels;

"(O) a pawnbroker;

"(P) a loan or finance company;

"(Q) a travel agency;

"(R) a licensed sender of money;

"(S) a telegraph company;

"(T) an agency in the United States Government or of a State or local government carrying out a duty or power of a business described in this clause (2); or

> "(U) another business or agency carrying out a similar, related or substitute duty or power the Secretary of the Treasury prescribes." 31 U.S.C. §§ 5312(a)(1) & (2).[2]

Based upon these provisions, the Secretary promulgated regulations requiring "[e]ach person subject to the jurisdiction of the United States . . . having an interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country shall report such relationship to the Secretary for each year in which such relationship exists." 31 C.F.R. § 103.24. Section 103.24 further provided that the report "shall provide such information as shall be specified in a reporting form prescribed by the Secretary."

Section 103.26, in turn, required that the reports mandated by § 103.24 "be filed on or before June 30 of each calendar year with respect to foreign financial accounts exceeding $10,000.00 maintained during the previous calendar year." This section then stated that the information "shall be filed with the Commissioner of Internal Revenue on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished." 31 C.F.R. § 103.26(d).[3]

The Commissioner of Internal Revenue had implemented these requirements with a two-step reporting process. First, Form 1040, Schedule B, Part III, Foreign Accounts and Foreign Trusts, instructed the taxpayer (insofar

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[2] The text quoted is that of §§ 5312(q)(1) & (2) before a minor amendment was adopted in 1986. Pub. L. 99-570, § 1362, 100 Stat. 3207-33 (October 27, 1986). That amendment added the words "including the United States Postal Service" to § 5312(a)(2)(U), but did not otherwise alter the language quoted above.

[3] Section 103.26, in the form in which it existed for the years in question, with the minor exception noted below, is reproduced in the Appendix. In April 1987, § 103.26(d) was recodified as §§ 103.26(c) and 103.26(d). The recodification did not change the substance of former §103.26(d). The dollar requirement was $5,000.00 in 1985. It went to $10,000.00 in 1986.

as is here relevant) that if he "had a foreign account" he had to answer the following question on the Schedule:

> "11. At any time during the tax year, did you have an interest in or a signature or other authority over a financial account in a foreign country (such as a bank account, securities account, or other financial account)?"

The Form contained a place to check "Yes" or "No," and referred the taxpayer to Form TD F 90-22.1. *There were no definitions nor further instructions.*

Form TD P90-22.1, in turn, stated that it "should be used to report financial interest in or signature authority or other authority over one of more bank accounts, securities accounts, or other financial accounts in foreign countries," if the aggregate value exceeded $10,000.00 ($5,000.00 in 1985). Form 90-22.1 exempted from its disclosure requirements two situations: first, those where the taxpayer "had signature authority or other authority over one or more foreign accounts," but did not have a "financial interest" in the accounts; and second, those where the taxpayer "had a 'financial interest' in one or more foreign accounts owned by a domestic corporation, partnership or trust which is required to file TD F 90-22.1."

The instructions for Form 90-22.1. also defined certain key terms."[4] Instructions F. defined "Bank, Financial Account" as follows:

> "F. Bank, Financial Account—The term 'bank account' means a savings, demand, checking, deposit, loan or any other account maintained with a financial institution or other person engaged in the business of banking. It includes certificates of deposit.
>
> "The term 'securities account' means an account maintained with a financial institution or other per-

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[4] These instructions were printed on the back of Form 90-22-1.

son who buys, sells, holds, or trades stock or other securities for the benefit of another.

"The term 'other financial account' means any other account maintained with a financial institution or other person who accepts deposits, exchanges or transmits funds, or acts as a broker or dealer for future transactions in any commodity on (or subject to the rules of) a commodity exchange or association." Department of the Treasury TD F 90-22.1, Instruction F. Supp. App. at 8.

The instructions did not define "financial institution." The regulations in effect in 1985 and 1986, however, 31 C.F.R. § 103.11(e), define a "financial institution" as did the statute, 31 U.S.C. § 5312(a)(2) as a bank, a securities dealer, a money exchange, a person who deals in traveler's checks, a person who transmits funds overseas for others, and certain casinos.

Instruction G defined "financial interest" as the following: (1) an account in which the taxpayer is an owner of record or has legal title; and (2) an account in which the owner of record or holder of legal title acts "as an agent, nominee, attorney, or in some other capacity on behalf" of the taxpayer; is a corporation in which the taxpayer owns more than 50% of the total value of the shares of stock; is a partnership in which the taxpayer owns an interest in more than 50% of the profits; or is a trust in which the taxpayer has a present beneficial interest in more than 50% of the assets, or from which the taxpayer receives more than 50% of his current income.

Instruction H defined "signature authority over an account" as the power to "control the disposition of money or other property in it by delivery of a document containing [the taxpayer's] signature." Instruction H went on to define "other authority" over the account as that which existed in a taxpayer "who can exercise comparable power over an account by direct communication to the bank or other person with whom the account is maintained, either orally or by some other means."

Instruction C specified when and where to file Form 90-22.1 as follows: "This report shall be filed on or before June 30 each calendar year with the Department of the Treasury, Post Office Box 32621, Detroit, MI 48232, or it may be hand-carried to any local office of the Internal Revenue Service for forwarding to the Department of the Treasury, Detroi, MI."

D. The Trial.

Trial before a jury occurred in the U.S. District Court in Maryland in September 1990. At the close of the prosecution's case, Mr. Clines moved for a judgment of acquittal on all counts. Tr. pp. 1113-1132. Specifically as to Counts One and Three, Mr. Clines argued that the prosecution's evidence did not show that Mr. Clines had a reportable interest in or authority over a foreign financial account in 1985. The Court denied the motion. Tr. p. 1132.

In closing argument, the prosecution argued that the "foreign financial account" for 1985 was "the TC capital account." Tr. p. 1485. The prosecution explained its theory: "Mr. Zucker told you that once that went into that account on the Energy Resources ledger, that was Thomas Clines' money. He had financial interest in that account once it went into the TC capital account, it was his account and he had to report it. He lied about it." *Ibid.*

At the close of the case, the Court instructed the jury that it could convict Mr. Clines under Counts One and Two if it found that his 1985 and 1986 returns were false *in either of the two ways* urged by the prosecution:

> "In order to convict the defendant you must unanimously agree on the manner in which the defendant made a false statement; that is you must all agree that he willfully gave a false response to the questions concerning a foreign financial account, or you

must all agree that he falsely stated the amount of the gross receipts received or both." Tr. p. 1529.

* * * *

"Second is that the tax return was false as to a material matter. Specifically, that the tax return contained an understatement of the defendant's gross receipts and/or falsely indicated that the defendant did not have a foreign financial account." Tr. p. 1533.

Mr. Clines had asked that the Court define "financial institution" in connection with the charges, and instruct the jury that neither Energy Resources nor Lake Resources during 1985 met the definition of a financial institution. Tr. p. 1547. The District Court refused to do so, and instead instructed as follows:

"A financial account means an account maintained with a financial institution or other person who accepts deposits, exchanges or transmits funds. A financial account is a foreign account if it is maintained in a foreign country. A foreign country includes all geographical areas located outside the United States, Guam, Puerto Rico and the Virgin Islands. A foreign financial account need only be reported if its maximum value during the calendar year in question exceeds a certain dollar amount. As to 1985, Count 3, it had to exceed $54,000. That was the so-called TC capital account according to the contention of the government. As to the calendar year '86, which according to the government is the C. Tea investment account, it had to exceed $10,000." Tr. pp. 1544-1545.

Defendant objected to this instruction since it did not define "financial institution." Tr. p. 1547.

The jury convicted Mr. Clines on all four Counts. The District Court sentenced Mr. Clines to a total of sixteen months in jail, and a fine of $40,000.00.[5]

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[5] The District Court sentenced Mr. Clines on the various Counts as follows: eight months in prison on each of Counts One and Two, to

Mr. Clines timely appealed. The Fourth Circuit Court of Appeals affirmed the convictions.

Both the Fourth Circuit and this Court denied requests for Stay pending the filing of this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

A. Vagueness of the Instruction on the Tax Return.

The convoluted and hypertechnical maze of statutes, regulations, forms and instructions involved in this case is a prison trap into which a taxpayer should not easily, nor constitutionally, fall. Moreover, when used as an instrument to selectively prosecute a target of a wide general investigation sweep of an Independent Counsel, the maze is dangerous indeed to our constitutional principles.

As this Court said in *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855 (1983):

> [7, 8] As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

Congress instructed the Secretary of the Treasury in 1970 to promulgate regulations requiring citizens of the United States to keep records and file reports of transactions with foreign financial agencies. 31 U.S.C.A. § 5314. The Secretary's regulations require that a person subject

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be served consecutively; six months in prison on each of Counts Three and Four, to be served consecutively to one another, but concurrently with the sentence on Counts One and Two; and a fine of $10,000.00 on each of the four Counts.

to the jurisdiction of the United States shall report to the Commissioner of Internal Revenue "a financial interest in, or signature or other authority over, a bank, securities or *other financial account* in a foreign country." 31 C.F.R. § 103.24(a) (1991). The regulations further provide that reports required by section 103.24(a) shall be filed with the Commissioner on forms prescribed by the Secretary. 31 C.F.R. § 103.26(d) (1987).

The Secretary implemented the regulatory requirements with a two-step reporting process. Form 1040, Schedule B, Part III instructed a taxpayer to indicate an interest in a financial account in a foreign country by checking "Yes" or "No" in the appropriate box, Form 1040 then referred the taxpayer to Form 90-22.1 which provided that it should be used to report a financial interest in or authority over bank accounts, securities accounts, or "other" financial accounts in a foreign country. Instruction F for completing Treasury Form 90-22.1 provides that "[t]he term 'other financial account' means any other account maintained with a financial institution."

The Form could easily have provided that one should report any "money owed to you or held for you by a foreign entity," instead of "other financial account." The term "financial institution" is misleading because it apparently does not mean what is commonly understood.

The question asked has nothing to do with the collection of Income Tax.[6]

The tax form question provides little real instruction to the taxpayer relevant to the complicated statute. There is no warning as to the complexity of the analysis required. It can, by no means, rise to the level of such reasonable specifity as to permit imprisonment for failure to properly compartmentalize the taxpayer's activity. One

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[6] The tax system, as applied to a cash basis taxpayer, only requires the reporting of money received, *not owed*. § 446(c)(1), Internal Revenue Code. Treas. Reg. § 1.446-1(c)(1)(i).

is led to conclude, by the common application of *ejusdem generis*, that the instruction is leading the taxpayer to report what is "like a bank account" in something that is "like a bank." An account payable by a private company run by one man is nothing like a bank or securities account.

By failing to properly apply the vague terms to his situation Clines was clobbered twice for the same error: First, by being held to have filed a false tax return, and Second, *for the same decision*, by not filing the Treasury Form.

This, in fact, was double punishment for the same error in a conclusion of law, i.e., was it a "financial account" in a "financial institution"? Counts III and IV required essentially the same proof as the 1040 return charge. It was impermissible double jeopardy in violation of the Fifth Amendment. *See, United States v. Kaiser*, 893 F.2d 1300 (11th Cir. 1990). *See, United States v. Lodwick*, 410 F.2d 1202, 1206 (8th Cir.), *cert. denied*, 396 U.S. 841 90 S.Ct. 105, 24 L.Ed.2d 92 (1969); *Gaunt v. United States*, 184 F.2d 284, 288, 290 (1st Cir. 1950), *cert. denied*, 340 U.S. 917, 71 S.Ct. 350, 95 L.Ed. 662 (1951). See also, *United States v. Gengo*, 808 F.2d 1, 3-4 n.1 (2nd Cir. 1986) (noting that filing a false return under § 7206(1) is a lesser included offense of tax evasion in violation of 7201); *United States v. Rosenthal*, 454 F.2d 1252, 1255 (2nd Cir.), *cert. denied*, 406 U.S. 931, 92 S.Ct. 1801, 32 L.Ed.2d 134 (1972) (holding that an offense under § 7203 is a lesser included offense of § 7201, and that Congress did not intend two punishments for the one criminal activity).

The dearth of the information provided the taxpayer is so vague and indefinite as to objectively create a situation in which an innocent or even negligent taxpayer runs a real and unreasonable risk of incarceration by not accurately running the maze. See *United States v. Mallas*, 762 F.2d 361 (4th Cir. 1985). Moreover, as here, it can be easily used to "get" an object of political prosecution.

The Fourth Circuit found it easy to conclude that CSF or Energy Resources was a "financial institution" simply because it held money owed to Clines, an account payable. That term, it said, was "broadly defined." *Id. at 7.* That, we suggest, is one of the problems.

The term "financial institution" has numerous meanings in federal law. Compare, for example, 31 U.S.C. § 5313, 31 U.S.C. § 5312, 11 U.S.C. § 101, 12 U.S.C. § 1715k, 12 U.S.C. 1817, 12 U.S.C. 3302, 12 U.S.C. § 4402. All of these sections, and various others, define "financial institution" differently. Moreover, the term "financial institution" even as defined within the same statute is interpreted differently among the circuits. See, *U.S. v. Bucey*, 876 F.2d 1297 (7th Cir. 1989) (defining "financial institution" as "agency, branch, or office" of person acting in one of the listed capacities, was inapplicable to individuals); *U.S. v. Tannenbaum*, 934 F.2d 8 (2nd Cir. 1991) (term "financial institution" *does* include a individual who engaged in dealing or exchanging currency); *U.S. v. Robinson*, 832 F.2d 1175 (9th Cir. 1987) (bank teller acting as private individual was *not* a "financial institution"); *U.S. v. Ridgon*, 874 F.2d 774 (11th Cir. 1989) (individual was engaged in the business of exchanging currency for cashier's checks, and thus was a "financial institution").

Would the ordinary taxpayer be led to understand that money to be owed to him by a foreign entity was a "foreign financial account in a financial institution? We think not.

In reviewing the functions of CSF in the "Iran-Contra" Affair investigation, the United States Congress stated as follows:

> A Swiss fiduciary company has no exact counterpart in the United States . . . Congressional Committee investigating Iran-Contra Affair, H. Rept. No. 100-433, S. Rept. No. 100-216, 100th Cong., 1st Sess. 332 (1987).

It is difficult to comprehend how the Constitution would abide incarceration of Mr. Clines for failing to properly recognize the proper legal position of a species commonly unknown in this country. See *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979).

The very breadth of the possible meanings of these terms, which the Fourth Circuit found satisfying, is the evil the Constitution forbids. It is settled that as a matter of due process, a criminal statute that objectively fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, or is so indefinite that it encourages arbitrary and erratic arrests and convictions, is void for vagueness. *Colautti v. Franklin*, 439 U.S. 379, 390 (1979); *United States v. Hariss*, 347 U.S. 612, 617 (1954); *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Here the criminal statute used is quite clear. It forbids "false returns." But the trap is a twisted step ladder of misleading information, the instructions and definitions for which are unconstitutionally vague.

B. Willfulness.

The standard set by this Court for the criminal willfulness requirement is the "voluntary intentional violation of a known legal duty." *United States v. Pompino*, 429 U.S. 10, 12 (1976). Without an understanding or clear defined meaning[7] of the term "financial institution" the Defendant could not properly, under any standards be deemed to have "willfully" violated the law. Moreover, without a definition the jury could not possibly have properly assessed his state of mind.

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[7] The Court should have decided that the uncertainty of the term "other financial account" was vague. Clines could not have violated the law, wilfully. This has been treated as a question of law which should have been resolved in his favor. *See, James v. United States*, 366 U.S. 213 (1961); *United States v. Critzer*, 498 F.2d 1160 (4th Cir. 1974).

In *Cheek v. United States*,[8] this Court held that it was error to instruct the jury to disregard evidence of a citizen's understanding that, within the meaning of the tax laws, he was not a person required to file a return or pay income taxes and that wages were not income. 498 U.S. ——, 112 L. Ed. 2d 617,631 (1991).

The District Court in this case committed the same error, but in reverse, by failing, over objection, to instruct the jury on the meaning of "financial institution" or "financial account." The following colloquy between The Court and Clines trial counsel, is revealing:

> "MS. JUNGHANS: Your Honor, I have to tell, and this came out of my rereading the transcript of our argument the other day, realizing that I might have focused the issue more precisely that I do, and it needs to be focused more precisely in the instruction. In order to have a financial account you have to have an account with the financial institution. That's what the regulations say. The regulations don't define financial institution. I asked you to instruct the jury that Energy and Lake aren't financial institutions, and I think you need to define what the initial institution is.
>
> THE COURT: Zucker says he runs kind of an investment account—
>
> MS. JUNGHANS: Your Honor, that's in 1985.
>
> THE COURT: I realize that. I think the foreign account aspect, which is the first one, and I think there is enough here to let them find—
>
> MS. JUNGHANS: I'm saying that they have to determine it's an account with a financial institution, and what we have is an account, in my view, that is with Energy Resources, which is not a financial institution. If you don't want to conclude what Energy Resources is, that is one thing. I think you have to tell the jury what a financial institution is

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[8] The vagueness of the terms, if defined by the Court, could have been argued by counsel as a defense, going to willfulness. *See, United States v. Garber*, 607 F.2d 92 (5th Cir. 1979). The Court cut that important opportunity off.

> and that is defined in the regulations as a bank, a casino . . .
>
> THE COURT: I'm not going to throw it into the charge. You can get the 4th Circuit to direct me to do it." Tr. 1451.

The Trial Court committed the same error as the forms —it never told the full story as to what the law regards is a "financial institution." Without that polestar, the jury had no alternative but to conclude that the Court was instructing them, without question, that Mr. Clines had a financial account in a foreign financial institution.[9] It was in the mind of the Trial Judge a closed issue on what really is a very open and confusing point.

II. INDEPENDENT COUNSEL WALSH HAD NO AUTHORITY TO PROSECUTE THOMAS CLINES FOR INCOME TAX VIOLATIONS AND FAILURE TO FILE TREASURY FORMS.

The selective prosecution of Thomas Clines was a result of the very evil of which Justice Scalia complained in his dissenting opinion in *Morrison v. Olson*, 487 U.S. 654, 697-734 (1988). In his dissent, Justice Scalia quoted a memorable speech by Justice Robert Jackson (Attorney General under President Franklin D. Roosevelt):

> . . . if the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With

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[9] Because the jury was "alternatively" charged, the case must be reversed since we do not know which alternative issue the jury focused on: "gross receipts," or "checking the box." *Chiarella v. United States*, 445 U.S. 222, 237 N. 1 (1980); *Leary v. United States*, 395 U.S. 6, 31-32 (1969). Moreover, a reversal of Counts I and II necessarily involves a reversal of Counts III and IV in this case, since Clines could not wilfully, as a matter of law, have failed to file a report when he was misled as to the proper legal characterization of the account payable by the vague question on the Form 1040.

> the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has comitted it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm-in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies . . . ID. at 728.

Justice Scalia warned against the harm and "unfairness" of an Independent Counsel run amok, without review, unbridled in expenditure and action, broadening the scope of the prosecution without any "check" of a higher elected authority. *Id.* at 729.

Petitioner raised early on that Independent Counsel Lawrence Walsh was given no specific authority to prosecute low-level functionaries for income tax violations, let alone the hypertechnical personal violations of which Petitioner was convicted. The Government has never contended that it was damaged, since Mr. Clines filed an Amended Return which was generally accurate. He started work on the Amended Return well before any criminal problems were on the horizon. Indeed, when in 1983, Mr. Clines had a *real* foreign bank account, he filed the correct Treasury Form. This effort of the Independent Counsel was, pure and simple, an expensive, successful quest to "get Tom Clines."

A. The Appointment of Independent Counsel for the Iran Contra Affair.

On December 4, 1986, the Attorney General filed an application with the United States Court of Appeal for the District of Columbia Circuit, No. 86-6. The Application requested the appointment of an independent counsel

to "Investigate whether violations of federal criminal law were committed by Lieutenant Colonel Oliver L. North, other United States Government officials, or other individuals [10] acting in concert with Lieutenant Colonel North or with other United States Government officials . . . in connection with the sale or shipment of military arms to Iran and the transfer of diversion of funds realized in connection with such sale or shipment." The Attorney General suggested that the appointee "should have jurisdiction sufficiently broad to investigate and prosecute any and all violations of federal criminal law which his or her investigation may establish in this matter. . . ."

After reviewing the Application, on December 19, 1986, the Court appointed Lawrence E. Walsh as Independent Counsel. The Court conferred upon Mr. Walsh the "jurisdiction to investigate to the maximum extent" permitted by the Act whether "Lieutenant Oliver L. North, other United States Government officials, or other individuals or organizations acting in concert with Lt. Col. North, or with other United States Government officials, has committed a violation of any federal criminal law" [11] relating to *five* enumerated categories of activities. In general, those categories involved activities at the core of the Iran Contra Affair—the sale, shipment or transfer of weapons or materiel, the financing thereof, and the diversion of the profits. The Court did not include in the listed items the performance or non-performance of any reporting obligation with respect to any of the activities conducted by or any of the income earned by the participants in the Affair.

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[10] Defendant was at all times relevant a private citizen not employed by any government agency. It is hard to see how he could be covered by the Ethics in Government Act purview and receive "special Treatment." See 28 U.S.C. §§ 591-598.

[11] Had the Court chosen to permit Mr. Walsh to investigate or prosecute *any* federal criminal law, there still would be substantial constitutional debate about his authority to charge the crimes involved in this case. The Court did not, however. It *narrowed* the scope of the authority.

The Order further conferred upon the Independent Counsel:

> ". . . jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law by Oliver L. North, and any person or entity heretofore referred to, developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation, and to seek indictments and to prosecute any persons or entities involved in any of the foregoing events or transactions *who are reasonably believed to have committed a violation of any federal criminal law* (other than a violation constituting a Class B or C misdemeanor, or an infraction, or a petty offense) *arising out of such events*, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any criminal offense; . . . .

(Emphasis added.)

B. The Prosecution of Petitioner Clines.

Mr. Clines has not been charged with committing any crime by virtue of his participation in the purchase, sale or transfer of arms, weapons or materiel. Nor has he been charged with any crime relating to the financing or funding of those activities, or the provision of support to the Contras. Nor with obstructing justice, nor lying to Congress. See *U.S. v. Secord*, 725 F.Supp. 563 (D.D.C. 1989). It is clear, therefore, that the Independent Counsel has not relied upon the principal authority granted to him in the Order of December 19, 1986 in fashioning the charges against this Defendant.

Rather, it appears that the Independent Counsel has relied upon the grant of authority to prosecute crimes "arising out of such events" contained in the second part of the Order. The Independent Counsel has taken for himself a much wider grant of authority than he was

given. The offenses charges in the Indictment do not "arise out of" any of the five events covered by the Order.

The offenses charged in the Indictment—filing false income tax returns and failing to file reports of a foreign bank account—are offenses which, even if proved, have only the most tenuous connection to any of the listed events. The crimes charged do not involve any act performed to further the sale or shipment of arms or the provision of aid to the Contras. Indeed, some of the crimes (Count II and IV) are alleged to have been committed after the Affair had ended and without any relationship whatsoever to the events of the Affair. The charges involve only whether or not Mr. Clines filing his own tax returns with his wife (acting alone and not in concert with Lt. Col. North or anyone else) willfully violated certain reporting requirements of the Internal Revenue Code and Title 31 as they applied to him in his personal life; they are independent of the matters for which the Independent Counsel was appointed.

Mr. Clines was not afforded the usual protections of a taxpayer against selective prosecution.[12] The Department of Justice has long maintained a comprehensive review procedure to insure that citizens are not singled out for "special treatment" depending upon the political status of the target. Taxpayers are given a chance to correct technical filing errors and to plead to misdemeanor counts. Those procedures were not followed by the Independent Counsel, notwithstanding the specific requirements of 28 U.S.C. Section 594(f). See *Morton v. Ruiz*, 415 U.S. 199 (1974). [Agencies bound to follow their own policies].

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[12] It is highly questionable whether a private employee of a private employer is even covered by the Ethics in Government Act. What is even more questionable is the equal protection of a law which exempts Congress. If Mr. Clines worked for someone working with Congressman Smith, under the same factual scenario, no Independent Counsel would be lurking around. The Attorney General would then have to follow the guidelines of the Tax Division.

Would this case have been brought, *but for* Mr. Clines' involvement in IRAN/CONTRA? We think not. Mr. Clines' money was deposited by him in the United States, in Virginia, in full view of the government. There was no real damages since the taxable income reported on the original and amended returns was similar. Indeed, the Petitioner may be due a refund. That issue is pending in Tax Court. Tr. 793-95.

The Government will undoubtedly and readily admit that Clines *was* targeted because of his role as a Secord functionary. Mr. Walsh will argue here as he does everywhere that his license extends to everything which he believes "arises out of IRAN/CONTRA." That is why after five years, Mr. Walsh continues on his broad and constantly expanding, and never-ending investigation.

Petitioner submits that *Morrison v. Olson*, *supra*, was wrongly decided and should be reviewed in light of recent history. But that decision did not address the issue raised here, that Independent Counsel Walsh had no specific authority *in this case* to pursue a Treasury Form charge or Tax charge that had nothing to do with what Mr. Walsh was supposed to investigate. It did not "arise out of" the specific events which were supposed to be Mr. Walsh's focus. It arose out of Mr. Clines' personal tax status. The fact that this is the most expensive Independent Counsel in history,[13] with the longest tenure strongly suggests that some guidance needs to be given to Independent Counsel as to the broad license taken when only specific, limited authority is given.

Mr. Walsh's prosecution of Petitioner without specific authority, in complete derogation of the guidelines of the Attorney General, on technical "Gotcha" charges, was a

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[13] As of December, 1991, $28,000,000.00 has been directly expended by the Independent Counsel Walsh. There is no report as to the indirect expenses of the many other agencies working regularly and directly under Mr. Walsh. *Nat. Law Journal*, Dec. 30, 1991.

denial of basic due process of law. It was "Plain Error." *Wood v. Georgia*, 450 U.S. 261 (1981).

III. THE FOURTH CIRCUIT COURT OF APPEALS DECISION DENYING PETITIONER HIS STATUTORY AND CONSTITUTIONAL RIGHT TO A TRIAL WHERE THE PETITIONER RESIDED AND THE RELEVANT CIRCUMSTANCES SURROUNDING THE CONTESTED ISSUES WERE LOCATED, CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The Fourth Circuit Court of Appeals concluded that notwithstanding how the returns were filed, or where Clines lived, since Mr. Clines' accountant had an office in Maryland and Mr. Clines and his bookeeper had met and corresponded with the accountant, that venue in Maryland "did not impermissibly offend [his] rights guaranteed by Sixth Amendment." The Fourth Circuit relied on *United States v. Garman*, 748 F.2d 218 (4th Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985), for the proposition that, "the crime of failure to file returns is committed in the district or districts where the taxpayer is required to file the returns." This is opposite in application to other decisions of other Circuits. *See*, for example, *United States v. Greene*, 862 F.2d 1512 (11th Cir. 1989).

There is no indication anywhere in the record that Mr. Clines filed his returns in the District of Maryland. In fact, both the 1985 and 1986 tax returns were mailed by Mr. Clines from his home in Virginia after his wife signed the forms. This was his historic procedure, in his 40 year-residence in Virginia.

According to the United States Constitution, criminal trials "shall be held in the State where the said crimes shall have been committed. U.S. Const. art. 3, § 2. The Sixth Amendment commands that a criminal trial shall be before an impartial jury of "the State and district wherein the crime shall have been committed." U.S. Const. Amend. VI.

Title 18 U.S.C. § 3237, for example, states:

> (a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.
>
> (b) Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where venue for prosecution of an offense described in section 7201 or 7206(1), (2), or (5) of such Code (whether or not the offense is also described in another provision of law) is based solely on a mailing to the Internal Revenue Service, and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: Provided, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

There is no evidence in the record that the returns were "begun, continued, or completed" in the District of Maryland. Furthermore, this offense involved the "use of the mails" which requires venue in the applicable District of Virginia. Petitioner filed a motion with Court challenging venue. It was erroneously denied. The government does not have the right to shop, pick and choose the venue of their preference. In *Travis v. United States*, 364 U.S. 631, 634-35 (1961), Justice Douglas stated:

> We are also aware that venue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of a tribunal favorable to it. . . Thus while the use of the mails might be thought to allow venue to be laid either at the sending or receiving end, the trial was recently restricted to the district of the sender, in light of the constitutional provisions already mentioned and the phrasing of a particular Criminal Statute.

Under 18 U.S.C. § 3237(a), "a criminal defendant has a constitutional right to be tried in the district in which the crime was committed." *U.S. v. Griley*, 814 F.2d 967, 973 (4th Cir. 1987). "The burden of proving that a crime occurred in a particular district is on the prosecution . . . by a preponderance of the evidence . . ."[14] *Id.* The Fourth Circuit fails to mention anywhere in its decision whether the Government satisfied that burden of proof. The venue nexus to Clines' accountant is artificially thin, indeed. Under that theory, if the accountant were in Alaska, the government could drag the Defendant to the Tundra for trial!

With the passing of 18 U.S.C. § 3237(b) Congress intended to permit a defendant, charged under 26 U.S.C. 7206(1), to be tried in the district of his residence, thus avoiding the necessity of a defendant charged with tax violations from having to defend a charge in a district chosen by the Government. *United States v. Yeuse*, 387 F.Supp. 132, 134 (E.D. Wis. 1975), citing, S.Rep.No. 1952, 1958 U.S. Code Cong. & Adm. News, pp. 3261, 3262. "Congress intended that defendants be given an absolute right to be tried for alleged violations enumerated in § 3237(b) in the district of their residence regardless of considerations of convenience." *Id.*

A similar situation occurred in *U.S. v. Rigdon*, 874 F.2d 780 (11th Cir. 1989), in a "failure to file" case. The Court held that since he could have mailed the Form

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[14] The Trial Court failed to instruct on venue. It was a hotly disputed issue. It was prejudicial, harmful, and plain error. See *Green v. United States*, 309 F.2d 852, 856-57 (5th Cir. 1962).

or filed with the local office, venue was proper where *he resided.*

The reason for the Government's choice is crystal clear, as Judge Ramsey noted in his sentencing decision when Clines requested probation or community service:

> "This court views a tax charge as requiring imposition of some sentence of imprisonment. We have also viewed tax charges as requiring the imposition of some fine." Transcript, December 13, 1990, p. 26.

It is the only imprisonment obtained by Mr. Walsh thus far for any "Iran/Contra" target.[15]

CONCLUSION

For the foregoing reasons, the petition of Thomas G. Clines should be granted.

Respectfully submitted,

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[15] Petitioner, who was a minor functionary in the "Iran/Contra" Affair, is the only Defendant to receive a prison term. The other defendants, including Lt. Col. Oliver North, were sentenced to probation. Compare this to the sentences imposed on the seven others convicted by this broad prosecution effort of the Independent Counsel: Colonel North (no jail) (conviction reversed); Admiral Poindexter (Six months) (conviction reversed); Robert McFarlane (no jail); Richard Secord (no jail); Albert Hakim (no jail); Carl "Spitz" Channell (Tax Offense) (no jail); Richard Miller (Tax Offense) (no jail, Alan Fiers (no jail); Former Assistant Secretary of State Elliot Abrams (no jail). The only other prosecutions to date have been that of Joseph Fernandez, (it was dismissed). *See United States v. Fernandez,* 913 F.2d 148 (CA4 1990) and Dewey Claridge (presently set for Trial), and Claire George (presently set for Trial).

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-5382

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

THOMAS G. CLINES,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Norman P. Ramsey, District Judge
(CR-90-64-R)

Argued: October 29, 1991

Decided: February 27, 1992

Amended by order filed March 27, 1992

Before PHILLIPS, SPROUSE, and WILKINS, Circuit Judges.

Affirmed by published opinion, Judge Wilkins wrote the opinion, in which Judge Phillips and Judge Sprouse joined.

COUNSEL

ARGUED: William A. McDaniel, Jr., LAW OFFICES OF WILLIAM ALDEN MCDANIEL, JR., Baltimore, Maryland, for Appellant. William Michael Treanor, Associate Counsel, OFFICE OF INDEPENDENT COUNSEL, Washington, D.C., for Appellee. ON BRIEF: Lawrence E. Walsh, Independent Counsel, Stuart E. Abrams, Associate Counsel, Gregory A. Mark, Associate Counsel, Geoffrey S. Berman, Associate Counsel, OFFICE OF INDEPENDENT COUNSEL, Washington, D.C., for Appellee:

OPINION

WILKINS, Circuit Judge:

Thomas G. Clines was convicted of underreporting gross receipts on his federal individual income tax returns and falsely stating on the returns that he did not have an interest in a financial account in a foreign country. 26 U.S.C.A. § 7206(1) (West 1989). He was also found guilty of failing to file reports disclosing to the Commissioner of Internal Revenue an interest in a foreign financial account. 31 U.S.C.A. § 5314 (West 1983). On appeal he claims that the evidence is insufficient to support these convictions and that venue in the United States District Court for the District of Maryland was improper. We affirm.

I.

For purposes of our review of the verdict of the jury, the following summary of the evidence is presented in the light most favorable to the Government. *See Glasser v. United States*, 315 U.S. 60, 80 (1942). After Air Force Major General Richard V. Secord began to supervise a covert operation to provide arms and ammunition to the Nicaraguan Contras, he recruited Clines, an Army veteran and former senior operative in the Central Intelligence Agency, to join the project as an arms procurer.

Secord also enlisted the aid of businessman Albert Hakim, who made arrangements with Compagnie de Services Fiduciaries S.A. (CSF), based in Geneva, Switzerland, to establish the financial infrastructure of the operation.

CSF provided to its individual and corporate clients a broad range of financial and investment management services that included assisting clients in the formation of corporations, providing corporate bookkeeping and accounting services, and accepting funds into accounts and investing the funds in bonds, securities, and commodities. At Hakim's request, CSF and its chief officer, William Zucker, formed eleven shell corporations chartered in Panama, Liberia, or Switzerland for the purpose of collecting money and financing the procurement of weapons. These corporations included Energy Resources International S.A. and Lake Resources Incorporated, the principal entities used to receive funds for the project. Pursuant to fiduciary agreements between Hakim and CSF, CSF undertook bookkeeping, accounting, and financial management responsibilities in the operation of Energy Resources, including investment of funds and management of accounts for the project and for individuals who shared in profits generated from the sale of arms and ammunition to the Contras.

Secord, Hakim, and Clines agreed that in 1985 Clines would receive 20 percent of the profits resulting from each arms shipment; Secord and Hakim would each receive 40 percent. As each phase of the project was completed, Secord and Hakim calculated the division of profits based on the agreed percentages and authorized CSF to distribute the profits. Upon receiving authorization from Secord and Hakim, CSF debited from the Energy Resources legder Clines' share of the profits from each arms shipment and then credited the profit share to the "TC capital account" also maintained on the Energy Resources ledger. The TC capital account page of the ledger recorded the profit allocations to Clines and transfers or

withdrawals of funds from the capital account that were made at Clines' direction.

Clines had complete authority to transfer or withdraw TC capital account funds. Withdrawals from the account in 1985 recorded on the Energy Resources ledger included four wire transfers totalling $155,000 from Clines' capital account to his account in a Virginia bank and cash withdrawals by him from the capital account totalling $217,820. Clines also ordered the transfer by CSF of $210 from his capital account to Union Bank of Switzerland to pay a rental fee for his safety deposit box. Because payments were made from the Energy Resources TC capital account at Clines' instructions, Zucker and other CSF officials considered the funds in the TC capital account to belong to Clines.

Following an investigation of the sale of arms to the government of Iran and diversion of sale proceeds to purchase weapons for the Contras, indictments were returned against Clines and others. Count One of the Clines indictment alleged that on his 1985 federal individual income tax return, Internal Revenue Service Form 1040, Clines underreported gross receipts and falsely stated that he did not have an interest in or authority over a financial account in a foreign country. Count Two contained similar charges relating to Clines' 1986 federal individual income tax return. Counts Three and Four alleged that in calendar years 1985 and 1986 he failed to file Department of the Treasury Form 90-22.1 reporting an interest in a foreign financial account.

Prior to trial Clines moved to dismiss Counts Three and Four, claiming that venue in the United States District Court for the District of Maryland was improper. He contened that because the instructions for completing Form 90-22.1 indicated the Department of the Treasury in Detroit, Michigan as the location where the form was to be filed venue for the crime of failure to file was proper only in the United States District Court for the

Eastern District of Michigan. The district court denied the motion, finding that because the instructions also provided that the form could be hand-carried to "any local IRS office" for delivery to the Department of the Treasury in Detroit, Michigan, venue for the offense of failure to file the form was not improper in Maryland. The court concluded that since venue in Maryland was proper for Counts One and Two, the decision of the Government to prosecute Counts Three and Four in the District of Maryland was reasonable and convenient to the parties.

Clines unsuccessfully moved for a judgment of acquittal at the conclusion of the Government's case, contending that he did not have a reportable interest in or authority over the capital accounts within the meaning of the applicable statutes and regulations. He contended that because he could obtain his share of a profit distribution only after Secord and Hakim determined the amount of his share and then directed that his share be credited to his capital account, he had no independent authority over the account. He also claimed that the corporate ledgers reflected merely bookkeeping entries not cognizable as reportable accounts.

Following Clines' convictions on all counts, the court imposed a sentence of sixteen months imprisonment and a fine of $40,000. Clines challenges his convictions on Counts One and Three on the grounds that the evidence was insufficient to support a finding by the jury that he had a reportable interest in a foreign financial account maintained at a financial institution. He challenges the convictions obtained as a result of Counts Three and Four on the grounds that venue in the District of Maryland was improper. He does not contest his conviction on Count Two.[1]

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[1] Count Two alleged that Clines underreported gross receipts on his 1986 federal individual income tax return Form 1040 and falsely stated that he did not have an interest in a financial account in a foreign country. This allegation was based on Clines' investment

II.

A.

The Bank Secrecy Act of 1970 was enacted "to require certain reports or records where they have a high degree of usefulness in criminal tax, or regulatory investigations or proceedings." 31 U.S.C.A. § 5311 (West 1983). To accomplish this end, the Act established reporting requirements for domestic transactions in United States currency, 31 U.S.C.A. § 5313 (West 1983), and transactions involving foreign financial agencies, 31 U.S.C.A. § 5314. The provisions of the Act relating to foreign financial transactions resulted from the concern of Congress that foreign financial institutions located in jurisdictions having laws of secrecy with respect to bank activity were being extensively used to violate or evade domestic criminal, tax, and regulatory requirements. *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 27 (1974).

Congress instructed the Secretary of the Treasury to promulgate regulations requiring citizens of the United States to keep records and file reports of transactions with foreign financial agencies. 31 U.S.C.A. § 5314. The Secretary's regulations require that a person subject to the jurisdiction of the United States shall report to the Commissioner of Internal Revenue "a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country." 31 C.F.R. § 103.24(a) (1991). The regulations further provide that reports required by section 103.24(a) shall be filed with the Commissioner on forms prescribed by the Secretary. 31 C.F.R. § 103.26(d) (1987).

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account maintained in 1986 at CSF under the assumed name "C. Tea." Unlike the Energy Resources TC capital account, Clines concedes that the C. Tea investment account was an interest in a foreign financial account within the ambit of 31 U.S.C.A. § 5314 and the applicable regulations.

The Secretary implemented the regulatory requirements with a two-step reporting process. Form 1040, Schedule B, Part III instructed a taxpayer to indicate an interest in a financial account in a foreign country by checking "Yes" or "No" in the appropriate box. Form 1040 then referred the taxpayer to Form 90-22.1 which provided that it should be used to report a financial interest in or authority over bank accounts, securities accounts, or other financial accounts in a foreign country. Instruction F for completing Form 90-22.1 provides that "[t]he term 'other financial account' means any other account maintained with a financial institution."

B.

Clines argues that Energy Resources was not a "financial institution," *see* 31 U.S.C.A. § 5312(a)(2) (West 1983 & Supp. 1991); 31 C.F.R. § 103.11(e) (1986); that the TC capital account was not an "other financial account," *see* 31 C.F.R. § 103.24(a); Form 90-22.1, Instruction F; and that he had no reportable "financial interest in, or signature or other authority over" the capital account, 31 C.F.R. § 103.24(a); *see* Form 90-22.1, Instruction H. The Government maintains that the TC capital account was a reportable foreign financial account maintained by Clines at CSF. We address each of these arguments in turn.

Clines first claims that the TC capital account was not "maintained with a financial institution" within the meaning of Form 90-22.1, Instruction F because it was recorded on the ledger of Energy Resources, an organization he contends was not a "financial institution" as defined in the statute and the regulations, 31 U.S.C.A. § 5312(a)(2); 31 C.F.R. § 103.11(e). We conclude that because the Energy Resources TC capital account was maintained at CSF by CSF employees who transmitted funds for Clines at his direction, CSF is an institution that fits within the definition of the term. By holding funds for third parties and disbursing them at their di-

rection, CSF functioned as a bank. *See* 31 U.S.C.A. § 5312(a)(2)(C); 31 C.F.R. § 103.11(e)(1). Through its maintenance for its clients of investment accounts that consisted of various securities, currencies, and commodities, it was "investment banker or investment company." 31 U.S.C.A. § 5312(a)(2)(I). In sending wire transfers of funds to Clines' United States bank account and to Union Bank of Switzerland to pay Clines' safe deposit box fee, CSF operated as "a licensed sender of money," 31 U.S.C.A. § 5312(a)(2)(R); *see* 31 C.F.R. § 103.11(e)(5), "or other person engaged in the business of transmitting funds abroad for others," 31 C.F.R. § 103.11(e)(5). The term "financial institution" is broadly defined, *United States v. Dela Espriella*, 781 F.2d 1432, 1436 (9th Cir. 1986), and we hold that CSF fits well within the ambit of that term.

Second, Clines contends that the reporting requirements do not encompass a capital account maintained on the ledger of Energy Resources; a capital account, he contends, is a mere bookkeeping entry rather than an account. Form 90-22.1 provides that it should be used by a taxpayer to report an interest in a bank account, securities account, or other financial account in a foreign country. Instruction F defines the term "other financial account" as "any other account maintained with a financial institution or other person who accepts deposits, exchanges or transmits funds." Because we have concluded that CSF is a financial institution, and because the evidence established that CSF accepted credits to and transmitted sums from the capital account of Clines' other domestic and foreign accounts, we reject the argument that the capital account does not fall within the definition of a financial account.

Clines also claims that because he had no independent authority to direct payments into or receive disbursements from the TC capital account prior to allocation of his share of the profits by Secord and Hakim, he had neither an interest in nor any other authority over the

account. Instruction H for completing Form 90-22.1 provides that a person has signature authority over an account if that person may control the disposition of money in the account on authority of his or her signature. The instruction defines "other authority" as authority that "exists in a person who can exercise [power comparable to signature authority] over an account by direct communication to the bank or other person with whom the account is maintained, either orally or by some other means."

With respect to the TC capital account, the evidence established that Clines' actual control of the funds was complete following allocation of his profit share when it was made unreservedly available to him. Following allocation neither Hakim nor Secord were consulted regarding disbursement of the funds to him. Clines' requests for payments from the account were honored by CSF in any form that he directed: currency was transferred directly to him, proceeds were transferred by wire to his Virginia bank account, and funds were transferred to a bank in Switzerland. Clines' complete control of funds maintained in the capital account at his disposal subsequent to allocation resulted in his having "other authority" over the account notwithstanding his lack of control over disposition of the funds prior to allocation. We hold that the evidence is sufficient to support the verdict of the jury on Counts One and Three.

III.

A defendant is entitled to be tried "by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. IV. The situs of a crime consisting of a failure to act is the place fixed for performance of the act. *Johnston v. United States*, 351 U.S. 215 (1956). The crime of failure to file returns is committed in the district or districts where the taxpayer is required to file the returns. *United States v. Garman*, 748 F.2d 218 (4th Cir. 1984), *cert. denied*, 470

U.S. 1005 (1985). The version of Form 90-22.1 for use in reporting an interest in foreign bank and financial accounts maintained in 1986 [2] provides:

> This report shall be filed on or before June 30 each calendar year with the Department of the Treasury, Post Office Box 32621, Detroit, MI 48232, or it may be hand carried to any local office of the Internal Revenue Service for forwarding to the Department of the Treasury, Detroit, MI.

Clines contends that venue was proper only in the United States District Court for the Eastern District of Michigan because Michigan is the location of the post office box to which reports may be mailed and is also the ultimate location designated for receipt of the Form by the Secretary of the Treasury.[3] Because Form 90-22.1 also provides that filing may occur in any local office, we conclude that venue in the District of Maryland was proper.

Our conclusion is consistent with the principal concern the courts have advanced as underlying the constitutional venue provisions: conducting trials in the vicinage of the crime in order to avoid unfairness and hardship to defendants as a result of prosecutions in remote places.

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[2] The version of Form 90-22.1 in effect in 1985 specifies Memphis, Tennessee as the location of the Department of the Treasury post office box and place for forwarding to the Department of the Treasury. With respect to the charge in Count Three of failure to file a report in 1985, Clines argues that venue would have been proper only in the Western District of Tennessee. Because the same reasoning applies, for ease of discussion we refer only to Detroit, Michigan as the place of filing for both 1985 and 1986.

[3] Clines also claims that to allow the Government to institute prosecution in any district because the Form provides that filing may be accomplished by hand-carrying the Form to "any local office of the Internal Revenue Service" would permit nationwide venue and would encourage forum shopping because the place of trial could be determined at the unfettered choice of the Government. We need not address this argument because the record contains no evidence that the Government engaged in forum shopping.

See, e.g., United States v. Cores, 356 U.S. 405, 407 (1958).

This "basic policy of the Sixth Amendment" is best served by holding trial where "[t]he witnesses and relevant circumstances surrounding the contested issues" are located. *Travis v. United States*, 364 U.S. 631, 640 (1961) (Harlan, J., dissenting); *see also* Note, *Criminal Venue in the Federal Courts: The Obstruction of Justice Puzzle*, 82 Mich. L. Rev. 90, 105 (1983) (concluding that purpose of constitutional venue limitations is "to promote thorough factfinding"). Clines was a Virginia resident whose accountant had offices in Maryland where he prepared Clines' 1985 and 1986 federal income tax returns. In addition, Clines and his bookkeeper met with and corresponded with his accountant in Maryland. We hold that venue properly lay in the District of Maryland based on the language of Form 90-22.1 and that venue in this location did not impermissibly offend Clines' rights guaranteed by the Sixth Amendment.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
INDEPENDENT COUNSEL DIVISION

No. 86-6

APPLICATION OF THE ATTORNEY GENERAL PURSUANT TO 28 U.S.C. §§ 592(c)(1) FOR THE APPOINTMENT OF AN INDEPENDENT COUNSEL REGARDING IRANIAN ARMS SHIPMENTS AND DIVERSION OF FUNDS

[Filed Dec. 4, 1986]

In accordance with the Independent Counsel provisions of the Ethics in Government Act, 28 U.S.C. § 592(c)(1), the Attorney General of the United States hereby applies for the appointment of an independent counsel to investigate whether violations of federal criminal law were committed by Lieutenant Colonel Oliver L. North, other United States Government officials, or other individuals acting in concert with Lieutenant Colonel North or with other United States Government officials, from in or around January 1985 (the exact date being unknown) to the present, in connection with the sale or shipment of military arms to Iran and the transfer or diversion of funds realized in connection with such sale or shipment.

Information received by the Attorney General

In late November 1986, the Attorney General received information which, upon further inquiry and analysis, he has deemed sufficient to constitute grounds to investigate

whether Lieutenant Colonel North, other United States Government officials, or other individuals acting in concert with Lieutenant Colonel North or other United States Government officials, violated federal criminal law at any point during 1985-1986 in connection with the sale or shipment of military arms to Iran, and the transfer or diversion of funds realized in connection with such sale or shipment.

After an initial review of the above-described information by the Department of Justice, the Attorney General has determined pursuant to 28 U.S.C. § 591(c) and the criteria contained therein that insofar as the information pertains to persons not covered by the Independent Counsel provisions of the Ethics in Government Act it is appropriate under the statute and in the national public interest for this matter to be investigated by an independent counsel.

The Attorney General has determined also that a complete investigation of all information in this matter will in all likelihood require the issuance of subpoenas, consideration of granting immunity to certain individuals, and the exercise of other customary prosecutorial powers. In conducting preliminary investigations pursuant to the Independent Counsel provisions of the Ethics in Government Act, however, the Attorney General is not free to exercise such powers. 28 U.S.C. § 592(a)(2). In addition, the investigation will require the obtaining of testimony and documents from foreign governments and individuals, as well as from a number of witnesses in various parts of the United States. These circumstances lead the Attorney General to conclude that further investigation is necessary, and that it is accordingly appropriate and in the national interest to seek the appointment of an independent counsel as promptly as possible.

Jurisdiction and selection of independent counsel

Pursuant to 28 U.S.C. § 592(d)(1), which requires this application to "contain sufficient information to assist the division of the court to select a[n] independent counsel and to define that independent counsel's prosecutorial jurisdiction," the Attorney General proposes that the independent counsel be granted jurisdiction to investigate whether violations of U.S. federal criminal law were committed by Lieutenant Colonel Oliver L. North, other United States Government officials, or other individuals acting in concert with Lieutenant Colonel North or with other United States Government officials, whether or not covered by the Independent Counsel provisions of the Ethics in Government Act, from in or around January 1985 (the exact date being unknown) to the present, in connection with the sale or shipment of military arms to Iran and the transfer or diversion of funds realized in connection with such sale or shipment. The independent counsel should have jurisdiction sufficiently broad to investigate and prosecute any and all violations of U.S. federal criminal law which his or her investigation may establish in this matter, and any related matters over which the independent counsel may request or accept jurisdiction pursuant to 28 U.S.C. § 594(e).

The questions which will need to be resolved by the independent counsel are of unusual sensitivity, complexity, and importance to the nation. Their resolution will demand an appreciation of complex issues and principles in the area of international relations, national security and defense, intelligence, counterterrorism, foreign aid, and foreign military sales, as well as a familiarity with the manner of execution of American foreign policy, the organization of the intelligence community, and procedures relating to classification of information, privileges, and authorizations. It is respectfully suggested that an attorney with substantial knowledge and experience in the above areas will be best able to discharge the duties incumbent upon the independent counsel. As in past

instances in which an independent counsel has been appointed, the Department of Justice stands ready to share with the independent counsel, if one is appointed, the information and evidence developed through the Department's analysis and inquiry into this matter.

Respectfully submitted,

/s/ Edwin Meese III
EDWIN MEESE III
Attorney General
of the United States

APPENDIX C

EXCERPTS FROM TRIAL JUDGE'S CHARGE TO THE JURY

* * * *

THE COURT: Mr. Foreman, ladies and gentlemen of the jury, let me on behalf of counsel and the Court thank very much for your obvious attention that you have paid to the case. As we have gone along your interest in the case has been apparent to us and you are an attentive jury. We are appreciative of that fact. I want to thank you for your patience in the matter of delays that occur in every case. It's part of the process and we are sorry that it is part of the process because it imposes upon your time as jurors.

We are also very appreciative indeed of the fact that none of you has been late and we have been able to start on time every time. Thank you very much indeed.

As you know, my function as a judge in this case and your function as jurors are quite different. It's my duty as the judge to instruct you as to the law which applies to the case. It's your duty as jurors to decide the facts and, in deciding the facts, to comply with the rules of law and to apply those rules as I state them to you without regard to what you think the law is or what you thing the law should be. In deciding the facts and the issues of fact in this case, you must decide them without prejudice or bias or sympathy one way or the other.

In the course of my instructions on the law of the case, if I state a particular rule or a direction or an idea in a variety of ways, or if I seem to have a particular rule recurring throughout the charge, it's not because I intend to emphasize that particular part of the charge nor should you infer that that's my intention. You are not to single out a certain sentence or a certain individual point or a certain instruction and ignore the

others. Rather, you are to consider all of my instructions as a whole and look at each instruction in light of all of the other instructions.

Now, you and only you are the judges of the facts in the case. If at any time either during the trial or during the course of this charge, by any expression of mine or by anything I may have said or done or may have not said or done that you consider significant and it seemed to you to indicate that I held a particular view of the facts or a particular aspect of the case and that I was indicating to you that I had an opinion about a certain fact or facts in the case, please disregard that because it was not my purpose to influence you and it was not my intention to do so, and you should disregard anything you thought you took from any expression of mine about what my view might be about any opinion you believe I might hold about any facts in the case.

In determining the guilt or innocence of the defendant on any of the charges, you may consider any evidence I refer to, if I should refer to any, any evidence counsel have referred you to in their arguments, but you may also consider any evidence, including the testimony and the exhibits, which have been admitted in the case, no matter who produced the exhibits, no matter who gave the testimony, no matter who called the witness who gave the testimony, whether or not counsel referred to the exhibit or the testimony or whether or not they referred to the exhibit, if you think that that particular item of testimony or that particular exhibit is material in determining a question of the defendant's guilt or innocence on any particular count of indictment before you.

You are to consider only the evidence in the case, but in considering the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw from the facts which you find to have been proved such reasonable inferences as seem justified to you in light of your own experience.

The statements and arguments of counsel are not evidence and you should not consider their statements as evidence unless those statements were made, as sometimes they were during trial, in the form of stipulations. When one of the lawyers said it is stipulated, that's a different category. That's the only time that a lawyer's statement becomes evidence, because when the parties agree through a stipulation that a fact or a series of facts exist and those facts are agreed to, you must accept that stipulation as evidence and regard the fact or the facts which are covered by the stipulation as conclusively proved.

It is the duty of each of the attorneys on either side of the case to object if the other side offers testimony or evidence which the opposing attorney believes is not properly admissible or if the other attorney believes that the judge should rule that the evidence is admissible only for a limited purpose. You should not be prejudiced against an attorney or his client simply because that attorney had occassion to make objections during the course of a trial. When I allowed testimony or admitted evidence over objections it was not because I was indicating that it was important evidence or more important than other evidence or that you were to give it any particular weight or effect. It was simply a ruling on admissibility; that is all it was. As I said before, it's up to you and you are the sole judges of credibility of the witnesses and you are, I'll tell you later, the ones who judge the weight and effect of all the evidence in this case.

If I sustained an objection to a question which was addressed to a witness, or if I ordered an answer stricken, you should disregard the question or you should disregard the answer which was given if I ordered it stricken. You may draw no inference from the wording of the question which I sustained an objection to nor should you speculate as to what the witness would have answered if I let him answer it.

During the course of the trial I may on occasion have asked a witness a question. When I did so it was because I wanted to bring out the particular fact that I didn't think had been fully covered by the testimony. It was not because I was trying to indicate to you that I held a particular opinion on a particular matter about which I asked. In other words I wasn't trying to bring out something I though was specifically important or to express an opinion about it, because you as jurors are always at liberty to disregard all comments of the Court in arriving at your own findings as to the facts of the case. You must accept the Court's instructions as to the law, but it is up to you to make your own findings of the facts.

This is a criminal case and there are certain basic rules which apply to criminal cases generally and I'm going to talk about some of those basic rules now.

The case comes here by way of an indictment. An indictment is only a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused and it does not create any presumption nor does it permit any inference of guilt of the defendent. When the defendant entered a plea of not guilty to each count of the indictment, that put in issue every material allegation of fact contained in each count of the indictment, and those pleas of not guilty serve as a continuing denial by the defendant of the evidence offered against him by the government.

Another rule which has application in criminal cases is that the defendant is entitled to the presumption of innocence. Therefore, even though a defendant is accused, he begins a trial with a clean slate; that is to say there is no evidence against him. That presumption rests upon the government, and the government must establish the defendant's guilt by evidence and that evidence must proffer beyond a reasonable doubt the guilt of the defendant with respect to every essential element of a particular count which is under consideration by the jury.

From the beginning of the trial to the end, the government has the burden of establishing beyond a reasonable doubt every fact essential to the conviction of the defendant. A defendant has no burden to sustain and no duty to prove that he did not commit a crime which he is alleged to have committed.

A reasonable doubt may arise not only from evidence produced but also from a lack of evidence. Since the burden is on the prosecution to prove the accused guilty beyond a reasonable doubt as to every essential element of the crime or crimes charged, a defendant has the right to rely upon the failure of the prosecution to establish such proof. The defendant may also rely upon evidence which is brought out on cross-examination of the prosecution's witnesses. The law does not impose, as I said, on the defendant, the duty of producing any evidence.

There are two types of evidence from which a jury may proper find a defendant guilty of an offense. One is direct evidence; that is the testimony of an eyewitness or the testimony of a human being who testifies to something which was observed or which is the result of the senses of that human being; I heard a gunshot, I'm telling you what I saw, I saw this happen. That is what we call direct evidence.

The other is circumstantial evidence. Circumstantial evidence is the proof of a chain of circumstances which points to the commission of an offense. Now, quite frequently we use the illustration of circumstantial evidence, you go to bed at the night, there is no snow on the ground, you wake up in the morning, there is snow on the ground, there are footprints across the front lawn and the paper is on the porch. You draw a quite reasonable inference that the newspaperboy walked across the front lawn and delivered the newspaper. It's quite reasonable and you are basing that on circumstantial evidence. Nobody said to you I saw the newspaper boy walk across your front

lawn and deliver the newspaper. You know it happened because of the chain of circumstances. There is snow on the ground, footprints and the newspaper is there.

As a general rule the law doesn't make distinction between direct evidence and circumstantial evidence. All the law requires is that before you convict a defendant you must be satisfied of the guilt of the defendant beyond a reasonable doubt from all of the evidence in the case, direct and circumstantial.

You have heard testimony about statements that the defendant is alleged to have made out of the courtroom concerning the charge for which he is on trial. Evidence relating to any statement or act or omission claiming to have been made or done by a defendant out of court and after a crime has been committed should always be considered with caution and weighed with great care and all such evidence should be disregarded entirely unless the evidence in the case convinces you as jurors beyond a reasonable doubt that the statement of the defendant or the act or admission was knowingly made or done by the defendant.

When I use knowingly in that term I mean for a statement or an act or admission done voluntarily or intentionally, not by mistake or for some other innocent reason. In determining whether a statement or act or omission which is claimed to have been made by a defendant out of court and after a crime has been committed was knowingly made or done, you should consider the age, the sex, the training, the education, the occupation and the physical and mental condition of the accused and all the other circumstances in evidence surrounding the making of the statement in question.

The person who is making the alleged statement may have been mistaken or may not have clearly expressed the meaning which was intended, or the witness who testifies to an alleged statement may have misunder-

stood or may have misquoted what was actually said, but when made out of court and proved reliable such a statement may be treated as trutsworthy and should be considered along with all the other evidence presented.

If after considering all the evidence about a statement or an act or an admission you determine that the statement, act or omission was knowingly made or done, you will give it such weight as you feel it deserves under all the circumstances.

The rules of evidence only permit witnesses to testify as to opinions or conclusions under certain circumstances. One such circumstance is a so-called expert witness. A witness who by education or experience has become an expert in some science or profession or calling may express an opinion as to relevant and material matters in which they profess to be expert and may also state why they hold the opinion.

You should look at each expert opinion which was received in evidence in this case and give that expert opinion such weight as you may think it deserves. If you should decide that the opinion of any of the expert witnesses is not based on such education and experience or if you should conclude that the reasons given in support of the expert opinion are not sound or that the opinion is outweighed by other evidence, you may disregard such opinion entirely.

As I indicated to you earlier, as jurors you are the sole judges of the credibility of witnesses and of the weight that their tesimony deserves. You should carefully scrutinize the testimony that each witness gave, the circumstances under which each witness testified and every matter in evidence which tends to indicate whether the particular witness is worthy of belief. Consider each witness' intelligence, motive, state of mind, demeanor of the witness and the manner of the witness on the witness stand. Consider also the relation which each witness may bear to either side of the case, the manner in which the witness might be affected by the verdict and the

extent to which, if at all, each witness is either supported or contradicted by other evidence.

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses which doesn't produce in your minds belief in the likelihood of truth as against the testimony of a lesser number of witnesses or other evidence which does produce such belief in your minds. The test isn't which side brought in the greater number of witnesses or which side presented the greater quantity of evidence, but which witness and which evidence appeals to your minds as being more accurate and otherwise trustworthy. The testimony of a single witness which produces in your mind a belief in the likelihood of truth is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony even though a number of witnesses may have testified to the contrary, if after a consideration of all the evidence in the case you hold a greater belief in the accuracy and reliability of that one witness.

When a defendant appears as a witness on his own behalf his testimony is a matter for your consideration within these principles which I have talked about which is applicable to all witnesses.

One who testifies under a grant of immunity or subject to a plea agreement that he will not be prosecuted is a competent witness. His testimony may be received in evidence and considered by the jury even though not corroborated or supported by other evidence. Such testimony, however, should be examined by you with greater care than the testimony of an ordinary witness. You should consider whether the tesimony may be colored in such a way as to further the witness' own interests, for a witness who realizes that he may procure his own freedom by incriminating another has a motive to falsify.

After such consideration you may give the testimony of the immunized witness or the witness who is under

a plea agreement such weight as you feel it deserves. You may also consider any demonstrated bias, prejudice or hostility of any witness toward the accused in determining the weight to be accorded to that witness' testimony.

Inconsistencies and discrepancies in the testimony of different witnesses may or may not cause you as jurors to discredit such testimony. Two or more persons who witness an incident may see it or hear it differently, and innocent misrecollection, like a failure of recollection, is not an uncommon experience. Inconsistencies of discrepancies in testimony, vagueness or limited recollection of a witness or between the testimony of differing witnesses should be considered by you, but in weighing their effect you should consider whether those inconsistencies or discrepancies which you think you see have to do with an important matter or do they have to do with an unimportant detail or do the discrepancies or inconsistencies result from innocent error or from willful falsehood.

A witness may be discredited or impeached not only by contradictory evidence but also by evidence that at other times that witness has made statements inconsistent with the present testimony of that witness. You should therefore consider, in weighing the testimony of each witness, whether that witness has made statements at other times which are inconsistent with the present testimony and whether such inconsistencies, if you find any, are the result of innocent error or willful falsehood. Also, does it have to do with an important matter or is it an unimportant detail.

An earlier contradictory statement of a witness is admitted to impeach the credibility of a witness and not to establish that what he said before was true. When you have considered all of the factors which bear on the credibility of each of the witnesses which I mentioned to you, you may conclude that you are going to reject all of the testimony of a particular witness; you may conclude that you are not going to reject any of the

testimony of a particular witness, you are going to accept all of it, or you may conclude that you are going to reject this part and accept that part of a particular witness' testimony. In other words, it's up to you to give the testimony of each of the witnesses such credibility, if any, as you think it deserves.

Now, the defendant here is not on trial for any act or conduct which is not charged in the indictment and you are not here to determine the guilt or innocence of anyone else, and you are here to determine the guilt or innocence of the defendant from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of anybody else, so if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the defendant of one or more of the charges, you should so find even though you may believe that one or more other persons may also be guilty. But if any reasonable doubt remains in your minds after impartial consideration of all the evidence in the case, it is your duty to find the defendant not guilty as to that count or those counts as to which a considerable doubt remains in your mind.

A separate crime or offense is charged against the defendant in each count of indictment. Each offense and the evidence pertaining to it should be considered separately. The fact that you may find the defendant guilty or not guilty of one of the offenses should not control your verdict as to any of the other offenses charged against the defendant. Unless the government proved beyond a reasonable doubt that the defendant has committed every element of an offense with which he is charged, you must find him not guilty as to that particular offense. I'm going to give you the elements of the offenses when I get to the detailing of the various offenses.

If after a full and fair consideration of all the facts and circumstances in evidence you find that the govern-

ment has failed to prove beyond a reasonable doubt that a defendant committed the offense charged, you must find the defendant not guilty as to the particular count. Conversely, if you find the government has proved beyond a reasonable doubt that a defendant did commit the offense charged in the particular count you should find the defendant guilty as to that particular count.

Now, when you are deliberrating on this case each of you must exercise your individual judgment so that when you reach a verdict it will be a verdict of each individual juror, but in order to return a verdict it is necessary that each juror agree thereto. In other words your verdict must be unanimous. In oder to return a verdict of guilty on Count 1 or Count 2 of the indictment, you must all agree on the particular acts on which the verdict is based.

In Counts 1 and 2 the defendant is charged with making two false statements on his income tax returns for the years 1985 and 1986. In each count the indictment alleges that Mr. Clines made a false statement in answer to the question of whether or not he had a foreign financial account and it also alleges that he falsely stated the amount of gross receipts received by him on Schedule C of his return.

In order to convict the defendant you must unanimously agree on the manner in which the defendant made a false statement; that is you must all agree that he willfully gave a false response to the question concerning a foreign financial account, or you must all agree that he falsely stated the amount of the gross receipts received or both.

It is your duty as jurors to consult with one another and to deliberate together with a view to reaching an agrement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself but do so only after impartial consideration of the evidence with your fellow jurors. In the course of your deliberations don't hesitate to reexamine your own

views and change your opinion, if you become convinced that an opinion you formerly held was erroneous, but don't surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of a fellow juror or merely for the purpose of returning a verdict.

There is nothing peculiarly different in the way you are to consider the proof in a criminal case from that in which all reasonable persons treat any question, depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for only those purposes for which it has been admitted and give it a reasonable and fair construction in light of your own knowledge of the natural tendencies and inclinations of human beings.

If the accused has been proved guilty, say so. If he has not been proved guilty, say so. Keep it constantly in mind that it would be a violation of your sworn duty to base a verdict in this case on anything but the evidence in the case. Remember also the question before you can never be will the government win this case or lose this case. The government always wins a case when justice is done no matter whether the verdict of the jury is guilty or not guilty.

As to the punishment provided for by law as to the offenses charged, that is a matter which is exclusively within the province of the Court. You should not consider in any way or try to consider any way that matter in arriving at your impartial verdict as to guilt or innocence of the accused on any of the counts.

In the course of the trial the government has put on testimony by various government agents and has shown you charts and summaries, and I have cautioned you about those charts and summaries. The testimony of government agents and charts or summaries prepared by them are received for the purpose of explaining facts

disclosed by testimony, books, records and other documents which are in evidence in the case. The testimony of government agents and charts or summaries are not themselves evidence or proof of fact. If such charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them. In other words, the testimony of the government agents and the charts or summaries are used as a matter of convenience so that if and to the extent that you find they are not accurate summaries of fact and figures shown by the evidence, you are to disregard them entirely.

In Counts 1 and 2 Thomas G. Clines, the defendant, is charged with violating Section 7206(1) of the Internal Revenue Code for the taxable years 1985 and 1986. Section 7206(1) of the Internal Revenue Code, 26 U.S.C.A. Section 7206(1), provides that, quote, any person who willfully makes and subscribes any return, omitting a few words, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, close quote, shall be guilty of an offense against the United States.

While Counts 1 and 2 involve the same criminal statute, they should be, as I told you earlier, considered independently by you in reaching a verdict.

The government has alleged that Mr. Clines filed these false income tax returns for years 1985 and 1986 and that these returns were false because he omitted gross receipts that he should have reported on Schedule C and because he answered no instead of yes to a question concerning foreign financial accounts.

You are instructed that the mere filing of inaccurate or incorrect returns does not constitute the crime of filing a false income tax return. The filing of an inaccurate return is a crime only if it is done knowingly and willfully, that is with the knowledge of its false nature when it is filed.

The gist of the offense charged in Counts 1 and 2 is the willful making and subscribing by the defendant of his joint tax return for 1985 and his individual tax return for 1986, which contain a written declaration that they made under penalties of perjury and which the defendant did not believe to be true and correct as to every material matter. Each year in question, that is 1985 and 1986, should be considered separately.

To prove a violation the government must establish each of the following four elements beyond a reasonable doubt:

First is the defendant made or caused to be made and subscribed an income tax return for the year in question.

Second is that the tax return was false as to a material matter. Specifically, that the tax return contained an understatement of the defendant's gross receipts and/or falsely indicated that the defendant did not have a foreign financial account.

Third, that when the defendant made or caused to be made and when the defendant signed the return, he did so willfully, knowing that the return was not true and correct as to the amount of gross receipts and/or the existence of a foreign financial account; and,

Fourth, that the return contained a written declaration that it was made under penalties of perjury.

If you find from your consideration of all the evidence that each of these four numbered propositions has been proved beyond a reasonable doubt with regard to either Count 1 or Count 2, then you should find the defendant guilty of that count. If, on the other hand, you find from your consideration of all the evidence that any one of those propositions has not been proved beyond a reasonable doubt as to either Count1 or Count 2, then you should find the defendant not guilty as to the count as to which the proposition has not been proved beyond a reasonable doubt.

Now, with regard to the first element I instruct you that the United States Individual and Joint Income Tax Return, Form 1040, and the accompanying schedules involved in this case are returns or other documents as contemplated by 7206(1) of the Internal Revenue Code. I also instruct you that the word subscribe simply means the signing of one's name to a document.

The parties have stipulated that the documents in question were signed by Clines. Nevertheless, you must specifically find that Mr. Clines did sign the documents. It's been stipulated, but there are four findings of fact in your deliberations.

The second element which the government must prove beyond a reasonable doubt, as I said, is the return was not true and correct as to a material fact. By true and correct I mean accurate and complete. The question of the materiality of the alleged false statement made in connection with the subscribing or signing of a tax return is a question of law for the Court. If you find as alleged in the indictment that the defendant made a false statement on his tax return relating to the gross receipts, irrespective of the amount, that is to say if you find the defendant received additional gross receipts in addition to what is recorded on his return, regardless of the amount, than I instruct you that such omission of income is a material matter as required under 7206(1). I point out that the government does not have to prove the exact amount by which the defendant's gross receipts were understated.

Similarly, if you find as alleged in the indictment that the defendant checked no on the tax return with regard to whether he had a financial interest in or signature or other authority over a foreign financial account, and you find that the defendant did have a financial interest in or signature or other authority over a foreign financial account, then I instruct you that such a false statement is also a material matter under 26 U.S.C. 7206(1).

The defendant is charged in Counts 1 and 2 with underreporting his gross receipts on Schedule C and the attachment to his '85 and '86 income tax return. Individuals who have their own business or who are self-employed must file Schedule C. The term, quote, gross receipts, close quote, on Schedule C means exactly that; all monies received or earned by an individual from his business or self-employment over the course of the calendar year. The expense that an individual incurs in connection with his business or self-employment, such as the cost to him of running the business or the cost of the goods that he sold, do not affect the amount of gross receipts. Gross receipts includes all monies received before any expenses are to be subtracted and individual expenses must also be reported as a separate entry on Schedule C. For the purpose of this case gross receipts reportable on Schedule C do not include interest, dividends or capital gains. You must determine with regard to Counts 1 and 2 whether the defendant willfully underreported his gross receipts for 1985 and 1986.

There is a distinction between civil liability for the payment of taxes and a criminal prosecution relating to one's tax return. Counts 1 and 2 of the indictment allege that the tax returns were false in two respects. First, it's alleged that Mr. Clines omitted gross receipts that should have been reported on Schedule C of the '85 and '86. And second, it's alleged that he filed false tax returns because he answered no instead of yes to the question concerning foreign bank or financial accounts. Mr. Clines is not charged with understating his total liability nor is there any criminal charge relating to whether or not he paid any amount of tax due for the years 1985 or '86.

You are instructed that in proving that the defendant violated 7206(1), the government does not have to prove there was a tax due and owing for '85 and '86. Whether the government has or has not suffered a monetary or

pecuniary loss as a result of alleged false return is not an element of 7206(1). You are instructed it is sufficient under 7206(1) if you find that the government has established beyond a reasonable doubt that either of the items was falsely reported on the 1985 or 1986 return. In other words, the government doesn't have to prove both were false. Proof of the falsity of a single item on a single return is sufficient. On the other hand, if you find that none of these items was falsely reported on the defendant's returns, then you should acquit the defendant.

I talked about willfully, and that's an important term in this case. Counsel emphasized it to you. An essential element of all of the offenses charged in the indictment is that the defendant acted willfully in filing false tax returns for calendar years 1985 and 1986 and failing to file reports of foreign financial accounts. An act is done willfully if it is done voluntarily and intentionally and with the specific intent to do something which the law forbids, that is to say with the purpose of either disobeying or disregarding the law.

You are instructed that the crime charged in Counts 1 and 2, making and subscribing to a false return, are complete at the time when the federal income tax returns in question are filed. Therefore, if you do not find that at the time Mr. Clines' return for the year involved was filed he had a specific intention to violate the law, you should find him not guilty of the offenses charged.

For the government to meet its burden of proving that the defendant acted willfully and with a specific intent to disobey or disregard the law, the government must prove willfulness by evidence independent of any understatement of gross receipt. That is to say, willfulness cannot be inferred merely by the failure to report gross receipts on the defendant's income tax returns for the years at issue.

The element of knowledge that I have referred to may be satisfied by inferences that have been drawn from

proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from his willful blindness to the existence of a certain fact or facts.

It is entirely up to you as jurors as to whether you find any deliberate closing of the eyes, any inference from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge. You should note that if a person in good faith believes, even though it is erroneous, that he has signed an accurate tax return, he cannot be guilty of filing a false tax return. If a person acted without reasonable grounds for belief that his conduct is lawful, then you must decide whether he willfully intended to file a false income tax return.

In determining the issue as to willfulness you are entitled to consider anything done or omitted to be done by the defendant and all the facts and circumstances in evidence which may aid in the determination of his state of mind. It is obviously impossible to ascertain or prove directly the operation of the human mind, but a careful and intelligent consideration of the facts and circumstances shown by the evidence in the case enables one to infer what another's intentions were in doing or not doing things. With the knowledge of definite acts we may draw definite logical conclusions.

We are in our daily affairs continuously called upon to decide from the acts of others what their intentions or purposes are, and experience has taught us that frequently actions speak more clearly than spoken or written words. To this extent you may rely in part on circumstantial evidence in determining the guilt or innocence of the defendant. You may consider it reasonable to draw the inference and find that a person intends the natural

and probable consequence of acts knowingly done or knowingly omitted. As I have said, it is entirely upon to you to decide what facts you find from the evidence.

In this regard there are certain matters which you may consider as pointing to willfulness, if you find such matters to exist in this case. By way of illustration only willfulness may be inferred by conduct such as structuring transactions so as to conceal income, failing to provide complete information to a tax preparer, creating false deductions, concealing assets or covering up sources of inco handling one's affairs to avoid making the records usual in transactions of a kind and any conduct the likely effect of which would be to mislead or conceal. In addition you may consider whether the understatement of gross receipts on the tax return was large or di minimis, although you should note, as I have previously stated, that an underpayment of taxes is not essential.

On the other hand, if you find that the defendant's conduct was inconsistent with an intent to conceal or mislead, or if you find that his conduct was consistent with negligence inadvertence or mistake, you may consider it as evidence negating the element of willfulness.

I give you those instances simply to illuminate the type of conduct which you may consider in determining the issue of willfulness. I do not, by these instructions, or this instruction particularly, mean to imply that the defendant engaged in any of such conduct or if he did whether it is in fact evidence of willfulness. It's for you as the triers of fact to make a determination as to whether he did or did not engage in any of these and whether they do or do not evidence willfulness.

Evidence has been introduced showing Mr. Clines did not prepare the tax returns in issue in this case; that the returns were prepared by Melvyn Leshinsky, a person who held himself out as one qualified to prepared federal income tax returns. If you find that Mr. Clines pro-

vided Mr. Leshinsky with full information with respect to his taxable income and expenses during the year and that the defendant then adopted, signed and filed the tax return on Form 1040 as prepared by Mr. Leshinsky, without having reason to believe that the return was incorrect, then you must find the defendant not guilty.

If you on the other hand find beyond a reasonable doubt that Mr. Clines did not provide full and complete information to Mr. Leshinsky or that he knew any return prepared by Mr. Leshinsky was incorrect and falsely stated a material matter, then you are not required to find the defendant not guilty simply because he did not prepare the return himself but rather had it prepared for him by another.

The fourth element, as I said, is that a written return must be one that contains or is verified by a written declaration that it was made under penalty of perjury. There is no dispute in this case as to whether the returns in question contained or were verified by a written declaration. As judges of the fact you still must make that determination simply by looking at the return. It either has that statement on it or doesn't, and you look at the return and find it there and find to your own satisfaction that it does have the statement there.

Evidence has been introduced that the defendant filed an amended tax return for calendar 1985. I instruct you that the filing of an amended return does not in any way excuse any willful false statements that may have been made on the original 1985 return. If you find that the defendant willfully made a false statement regarding a material matter on his original '85 return, then you may find the defendant guilty on Count 1 regardless of whether his amended 1985 return corrected the false statement. However, if you find that the defendant did not willfully make a false statement on his 1985 return, thein you must find the defendant not guilty with regard to Count 1.

You may consider the filing of the amended 1985 return as it relates to the intent of the taxpayer and as it relates to the amount of gross receipts received for the year 1985.

Counts 3 and 4 charge that the defendant willfully failed to file a report concerning a foreign financial account. Count 3, rather, charges failure to file a foreign account report for the calendar year 1985; Count 4 says willfully failed to file a report concerning a foreign financial account for calendar year 1986.

While Counts 3 and 4 involve the same criminal statute, they should be considered independently by you in reaching a verdict. There are three elements to this the government must prove beyond a reasonable doubt in order to establish those offenses:

First, that the defendant was the person required by law or regulation to file a form TDF 90-22.1 for the calendar year involved, that is to say 1985 for Count 3, 1986 for Count 4.

Second, that the defendant failed to file such a form by the time required by law; that is to say June 30, 1986 for the calendar year '85 and June 30, 1987 for the calendar year 1986.

And, third, that the defendant's failure to file such form was willful.

The burden is on the prosecution, as I said, to prove each of these elements beyond a reasonable doubt. The law never imposes on a defendant in a criminal case the burden of providing any evidence or calling any witnesses.

The first determination you must make is whether the defendant was required to file a report concerning a foreign financial account. The defendant, a U.S. citizen, was required to file a TDF 90-22.1 if he had a financial interest in or signature or other authority over a foreign financial account over a certain value at the relevant

time. An individual has a finacial interest in a foreign account, one, if the individual himself is the owner of record or has a legal title to the account; or, two, if another party is the owner of record or has legal title to the account but is acting as agent, nominee, attorney or some other capacity on behalf of the individual in question.

An individual has signature or other authority over a foreign account if the individual can control the disposition of money in the account by either delivering a document containing his signature to the person with whom the account is maintained or directly communicating either orally or by some other means with a person with whom the account is maintained or directly communicating either orally or by some other means with a person with whom the account is maintained or the person with control of the account. The government must prove that the defendant had either, one, a financial interest in a foreign financial account or, two, signature or other authority over a foreign account. The government need not prove both.

A financial account means an account maintained with a financial institution or other person who accepts deposits, exchanges or transmit funds. A financial account is a foreign account if it is maintained in a foreign country. A foreign country includes all geographical areas located outside the United States, Guam, Puerto Rico and the Virgin Islands. A foreign financial account need only be reported if its maximum value during the calendar year in question exceeds a certain dollar amount. As to 1985, Count 3, it had to exceed $5,000. That was the so-called TC capital account according to the contention of the government. As to calendar year '86, which according to the government is the C. Tea investment account, it had to exceed $10,000.

The maximum value of an account is determined by its value on any quarterly or more frequent account state-

ment issued during the year in question, or, if such periodic account statements are not issued, it is the maximum value of the account at any time during the year in question.

The second element of the offense of failure to file is the defendant failed to file hte timely form TDF 90-22.1 for 1985 and 1986, and the law provides that a foreign financial account report, TDF 90-22.1, is to be filed with the Treasury Department or IRS on or before June 30, '86 for calendar 1985 and on or before June 30, 1987 for calendar 1986.

The third and final element which the government must prove beyond a reasonable doubt in order to establish the offense of failure to file foreign financial account reports is that the defendant acted willfully. The word willfully means the same in this instance as it did before, that is it's an intentional violation of a known legal duty.

When you retire to your jury room, your number one juror will be your spokesperson in court. When you reach an unanimous verdict and all agree on the verdict, notify the jury bailiff and you will return to the courtroom with your verdict.

If during the course of deliberations you need to deliberate with the Court, have your foreperson send a note to me, but don't attempt to communicate with me or anybody else except by a note, and never communicate to anybody, including me, where you stand numerically or otherwise on the question of guilt or innocence until you are unanimous or you have agreed on your verdict, at which time it is agreeable to say we are unanimous or however you put it. Don't send out a note that says we are split such-and-such a way and give me a numerical number.

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APPENDIX D

EXCERPTS FROM UNITED STATES ATTORNEYS' MANUAL

October 1, 1990

B. Tax Division Referrals for Prosecution

The U.S. Attorney is authorized to conduct a Title 26 grand jury investigation into matters referred for prosecution by the Tax Division to the extent necessary to perfect the tax charges authorized for prosecution.

C. Tax Division Referrals for Grand Jury Investigation

The U.S. Attorney is authorized to conduct a Title 26 grand jury investigation into matters referred for that purpose by the Tax Division, whether upon IRS (*see* USAM 6-4.121, *supra*) or Tax Division (*see* USAM 6-4.126, *infra*) request, to the extent necessary to either perfect the tax charges authorized for investigation or determine that prosecution is inappropriate (*see* USAM 6-4.242, *infra*).

D. Joint Tax-Nontax Investigations with IRS Participation: Delegation of Authority with Respect to Approving Request Seeking to Expand a Nontax Grand Jury Investigation to Include Inquiry into Possible Criminal Tax Violations

Effective October 1, 1986, Tax Division Directive No. 86-59 was issued to confer a delegation of authority with respect to approving requests seeking to expand nontax grand jury investigations to include inquiry into possible federal criminal tax violations on the following individuals:

1. Any U.S. Attorney appointed under 28 U.S.C. § 541 or § 546.

2. Any attorney-in-charge of a Crimial Division Organized Crime Strike Force established pursuant to 28 U.S.C. § 510.

3. Any independent counsel appointed under 28 U.S.C. § 593.

The authority conferred allows the designated official to approve, on behalf of the Assistant Attorney General, Tax Division, a request seeking to expand a nontax grand jury investigation to include inquiries into potential federal criminal tax violations in a proceeding which is being conducted within the sole discretion of the designated official's office. (26 C.F.R. § 301.6103(h)(2)-1(a)(2)(ii).) *Provided*, that the delegated official determines that:

1. There is reason to believe, based upon information developed during the course of the nontax grand jury proceedings, that federal criminal tax violations may have been committed.

2. The attorney for the government conducting the subject nontax grand jury inquiry has deemed it necessary in accordance with Rule 6(e)(3)(A)(ii), Fed.R. of Cr.P., to seek the assistance of government personnel assigned to the IRS to assist said attorney in his/her duty to enforce federal criminal law.

3. The subject grand jury proceedings do not involve a multi-jurisdictional investigation, nor are the target individuals considered to have national prominence—such as local, state, federal or foreign public officials or political candidates; members of the judiciary; religious leaders; representatives of the electronic or printed new media; officials of a labor union; and major corporations and/or their officers when they are the targets (subjects) of such proceedings.

4. A written request seeking the assitance of IRS personnel and containing pertinent information re-

lating to the alleged federal tax offenses has been forwarded by the designated official's office to the appropriate IRS official (*e.g.*, Chief, Criminal Investigations).

5. The Tax Division of the Department of Justice has been furnished by certified mail a copy of the request seeking to expand the subject grand jury to include potential tax violations, and the Tax Division interposes no objection to the request.

6. The IRS has made in a referral pursuant to the provisions of 26 U.S.C. § 6103(h)(3) in writing stating that it:

a. Has determined, based upon the information provided by the attorney for the government and its examination of relevant tax records, that there is reason to believe that federal criminal tax violations have been committed;

b. Agrees to furnish the personnel needed to assist the government attorney in his/her duty to enforce federal criminal law; and

c. Has forwarded to the Tax Division a copy of the referral.

7. The grand jury proceedings will be conducted by an attorney(s) from the designated official's office in sufficient time to allow the results of the tax segment of the grand jury proceedings to be evaluated by the IRS and the Tax Division before undertaking to initiated criminal proceedings.

The authority delegated includes the authority to designate: the targets (subjects) and the scope of such tax grand jury inquiry, including the tax years considered to warrant investigation. This delegation also includes the authority to terminate such grand jury investigations, provided, that prior written notification is given to both the IRS and the Tax Division. If the designated

official terminates a tax grand jury investigation or the targets (subjects) thereof, then the designated official shall indicate in its correspondence that such notification terminates the referral of the matter pursuant to 26 U.S.C. § 7602(c).

This delegation of authority does not include the authority to file an information or return an indictment on tax matters. No indictment is to be returned or information filed without specific prior authorization of the Tax Division. Except in Organized Crime Drug Enforcement Task Force Investigations (Drug Task Force), individual cases for tax prosecution growing out of grand jury investigations shall be forwarded to the Tax Division by the U.S. Attorney, independent counsel, or attorney-in-charge of a strike force with an SAR and exhibits through Regional Counsel (IRS) for evaluation prior to transmittal to the Tax Division. Cases for tax prosecutions growing out of the grand jury investigations conducted by a Drug Task Force shall be forwarded directly to the Tax Division by the U.S. Attorney with an SAR and exhibits.

The authority delegated is limited to matters which seek either to:

1. Expand nontax grand jury proceedings to include inquiry into possible federal criminal tax violations;

2. Designate the targets (subjects) and the scope of such inquiry; or

3. Terminate such proceedings.

In all other instances, authority to approve the initiation of grand jury proceedings which involve inquiries into possible criminal tax violations, including requests generated by the IRS, remains vested in the Assistant Attorney General in charge of the Tax Division as provided in 28 C.F.R. § 0.70. In addition, authority to alter any actions taken pursuant to the delegations contained

herein, is retained by the Assistant Attorney General in charge of the Tax Division in accordance with the authority contained in 28 C.F.R. § 0.70.

See USAM 6-4.125, *infra*, for Drug Task Force procedures.

6-4.214 Conferences

Conferences are not a matter of right but, if requested, are generally granted.

A conference is designed to provide the putative defendant an opportunity to present any explanations or evidence which he/she desires the Tax Division to consider in reaching a decision regarding prosecution. A conference is not an opportunity to explore the government's evidence. The Division's practice regarding "discovery" is to advise conferees of the proposed charges, method of proof, and income and tax figures recommended by IRS. The putative defendant is also advised that the charges, method of proof, and computations are subject to change. Statements made by a proposed defendant will be used not only to evaluate the matter but also in any court proceeding, criminal or civil. Fed.R.Evid. 801(d)(2). However, since May 30, 1986, statements made by attorneys for taxpayers (*i.e.*, vicarious admissions) at conferences will *not* be utilized in general in court proceedings. Investigative leads provided at the conference may, however, of course be developed. In administratively investigated cases, plea negotiations are permitted consistent with the Tax Division's major count policy and appropriate U.S. Attorney's Office policy. *See* DOJ Tax Division Directive No. 86-58 (May 14, 1986).

Normally, if time and circumstances permit, a conference in Washington, D.C., is granted upon a written request to the Tax Division from the taxpayer or the taxpayer's authorized representative. However, if the matter has been forwarded to the U.S. Attorney before the re-

quest is received, the request will be denied with the suggestion that the taxpayer seek a conference with the U.S. Attorney. Such conference is granted at the discretion of the U.S. Attorney. In unusual circumstances, the Tax Division may request that a conference be held and that the U.S. Attorney submit a report regarding any recommended changes in the authorization.

6-4.215 Expedited Review

An expedited review is one in which the Tax Division will render a final decision regarding prosecution within thirty (30) days of receipt from IRS of the CRL, SAR and relevant exhibits. In exceptional circumstances when the U.S. Attorney finds tha a given matter cannot be processed within the Division's stated guidelines, the U.S. Attorney personally must submit a written request to the Chief, Criminal Section, requesting an expedited review. The request must outline whatever difficulties exist requiring such expedited review. An expedited review will be granted only when such difficulties are shown to be exceptional circumstances.

6-4.216 Priority Review

A priority review is one wherein the Tax Division will render a final decision regarding prosecution within sixty (60) days of receipt from IRS of the CRL, SAR, and relevant exhibits. A request for a priority review must be made in writing by an Assistant U.S. Attorney to the Chief, Criminal Section and will be granted on a showing of exceptional circumstances.

6-4.217 On-Site Review

Criminal Section personnel will perform on-site reviews of Drug Task Force and other matters in appropriate circumstances. On-site reviews, either of grand jury investigations or prosecution recommendations, are only granted in exceptional circumstances and through written request procedure outlined in USAM 6-4.215, *supra*.

6-4.218 Authorizations and Declinations

The final authority for the prosecution of all criminal tax matters rests with the Assistant Attorney General, Tax Division, 28 C.F.R. § 0.70. *See* USAM 6-4.212, *supra.*

6-4.219 Assistance of Criminal Section Personnel

The Tax Division will consider requests by the U.S. Attorney for litigation assistance. Reasons for requests for trial assistance include those instances when the U.S. Attorney:

A. Recuses himself/herself and his/her office;

B. Lacks sufficient resources or personnel; or

C. Declines to prosecute a matter. (*See* USAM 6-4.244, *infra.*)

The U.S. Attorney is generally expected to handle those matters accepted for prosecution under the non-complex procedures. *See* USAM 614.244, *infra.*

6-4.246 Request to Dismiss Prosecution

Indictments, informations, and complaints may not be dismissed without prior approval of the Tax Division except when a superseding indictment has been returned or the defendant has died. Requests to dismiss prosecutions are the personal responsibility of the U.S. Attorney and all requests relating thereto must accordingly be signed. Form USA-900 may be used for this purpose.

6-4.247 U.S. Attorney Protest of Declination

If in disagreement with the Tax Division's decision to decline prosecution of a matter arising out of a grand jury investigation, the U.S. Attorney may request reconsideration of that determination. Such request must be in writing and set forth the U.S. Attorney's reasons for desiring to proceed with prosecution.

The Tax Division will not entertain protests by the U.S. Attorney of matters which were administratively investigated by the IRS. *See* USAM 6-4.241, *supra.*

6-4.248 Status Reports

After criminal tax cases have been referred to a U.S. Attorney, it is essential that the Tax Division be kept advised of all developments. As the case progresses, the minimum information required for the records of the Tax Division is as follows:

A. A copy of the indictment returned (or no billed) or the information filed, which reflect the date of the return (or no bill) or filing;

B. Date of arraignment and kind of plea;

C. Date of trial;

D. Verdict and date verdict returned;

E. Date and terms of sentence; and

F. Date of appeal and appellate decision.

It is important that information regarding developments in pending cases be provided to the Tax Division in a timely manner in order that the Department's files reflect the true case status and so that, upon completion of the criminal case, the case can be timely closed and returned to the IRS for the collection of any revenue due through civil disposition.

6-4.249 Return of Reports and Exhibits

Upon completion of a criminal tax prosecution by a final judgment and the conclusion of appellate procedures, the U.S. Attorney should return to witnesses their exhibits. Grand jury materials should be retained by the U.S. Attorney under secure conditions, in accordance with the requirements of maintaining the secrecy of grand jury material. *See* Fed.R.Cr.P. 6(e). All non-grand jury reports, exhibits, and other materials furnished by the

IRS for use in the investigation or trial should be returned by certified mail, return receipt requested, to the appropriate District Director, IRS, Attention: Chief, CID, as directed in the Tax Division's letter authorizing prosecution or as directed by Regional Counsel in cases directly referred to the U.S. Attorney.

6-4.270 *Criminal Division Responsibility*

The Criminal Division has limited responsibility for the prosecution of offenses investigated by the IRS. Those offenses are: excise violations involving liquor tax, narcotics, stamp tax, firearms, wagering, and coin-operated gambling and amusement machines; malfeasance offenses committed by IRS personnel; forcible rescue of seized property; corrupt or forcible interference with an officer or employee acting under the internal revenue laws; and unauthorized mutilation, removal or misuse of stamps. *See* 28 C.F.R. § 0.70.

6-4.300 TAX DIVISION POLICIES REGARDING CASE DISPOSITION AND SENTENCING

6-4.310 *Major Count(s) Policy/Plea Agreements*

The overwhelming percentage of all criminal tax cases are disposed of by entry of a plea of guilty. In most cases, the transmittal letter forwarding the case from the Tax Division to the U.S. Attorney will identify the major count(s) that have been authorized for prosecution. The U.S. Attorney's Office, without prior approval of the Tax Division, is authorized to accept a plea of guilty to the major count(s) of the indictment or information.

The U.S. Attorney also is authorized to seek a plea to more than the major count(s) if it is considered warranted. As part of the major count policy, the timeliness of a plea offer should also be considered in assessing the value of the plea solely to the major count(s). This comports with standard DOJ policy regarding prompt disposition of cases. *See Principles of Federal Prosecution* on JURIS.

APPENDIX E

REGULATIONS AND STATUTORY PROVISIONS

31 C.F.R. 103.24

§ 103.24 Reports of foreign financial accounts.

Each person subject to the jurisdiction of the United States (except a foreign subsidiary of a U.S. person) having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country shall report such relationship to the Secretary for each year in which such relationship exists, and shall provide such information as shall be specified in a reporting form prescribed by the Secretary to be filed by such persons. Persons having a financial interest in 25 or more foreign financial accounts need only note that fact on the form. Such persons will be required to provide detailed information concerning each account when so requested by the Secretary or his delegate.

[42 FR 63774, Dec. 20, 1977]

31 C.F.R. 103.26

§ 103.26 Filing of reports.

(a) A report required to be filed by paragraph (a)(1) or (a)(2) of § 103.22 shall be filed within 15 days following the day on which the transaction occurred. The reports shall be filed with the Commissioner of Internal Revenue on forms to be prescribed by the Secretary. All information called for in such forms shall be furnished. A copy of each report shall be retained by the financial institution for a period of five years from the date of the report.

(b) Reports required to be filed by § 103.23(a) shall be filed at the time of entry into the United States or at the time of departure, mailing or shipping from the

United States, unless otherwise directed or permitted by the Commissioner of Customs. They shall be filed with the Customs officer in charge at any Customs port of entry or departure, or as otherwise permitted or directed by the Commissioner of Customs. If the currency or other monetary instruments with respect to which a report is required do not accompany a person entering or departing from the United States, such reports may be filed by mail on or before the date of entry, departure, mailing or shipping, with the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D.C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(c) Reports required to be filed by § 103.23(b) shall be filed with the Commissioner of Customs within 30 days after receipt of the currency or other monetary instruments. They may be filed with the Customs officer in charge at any port of entry or departure, or by mail addressed to the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D.C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(d) Reports required to be filed by § 103.24 shall be filed on or before June 30 each calendar year with respect to foreign financial accounts exceeding $10,000 maintained during the previous calendar year. They shall be filed with the Commissioner of Internal Revenue on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(e) Forms to be used in making the reports required by §§ 103.22 and 103.24 may be obtained from the Internal Revenue Service. Forms to be used in making the reports required by § 103.23 may be obtained from the U.S. Customs Service.

(Information collection requirements contained in paragraph (a) were approved by the Office of Management and Budget under control number 1505-0087)

[37 FR 6912, Apr. 5, 1972, as amended at 50 FR 5068, Feb. 6, 1985. Redesignated at 50 FR 27824, July 8, 1985, and amended at 50 FR 42693, Oct. 22, 1985]

31 U.S.C. § 5312

§ 5312. Definitions and application

(a) In this subchapter—

(1) "financial agency" means a person acting for a person (except for a country, a monetary or financial authority acting as a monetary or financial authority, or an international financial institution of which the United States Government is a member) as a financial institution, bailee, depository trustee, or agent, or acting in a similar way related to money, credit, securities, gold, or a transaction in money, credit, securities, or gold.

(2) "financial institution" means—

(A) an insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)));

(B) a commercial bank or trust company;

(C) a private banker;

(D) an agency or branch of a foreign bank in the United States;

(E) an insured institution (as defined in section 401(a) of the National Housing Act (12 U.S.C. 1724(a)));

(F) a thrift institution;

(G) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.);

(H) a broker or dealer in securities or commodities;

(I) an investment banker or investment company;

(J) a currency exchange;

(K) an issuer, redeemer, or cashier of travelers' checks, checks, money order, or similar instruments;

(L) an operator of a credit card system;

(M) an insurance company;

(N) a dealer in precious metals, stones, or jewels;

(O) a pawnbroker;

(P) a loan or finance company;

(Q) a travel agency;

(R) a licensed sender of money;

(S) a telegraph company;

(T) an agency of the United States Government or of a State or local government carrying out a duty or power of a business described in this clause (2); or

(U) another business or agency carrying out a similar, related, or substitute duty or power the Secretary of the Treasury prescribes.

(3) "monetary instruments" means—

(A) United States coins and currency; and

(B) as the Secretary may prescribe by regulation, coins and currency of a foreign country, travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, stock on which title is passed on delivery, and similar material.

(4) "person", in addition to its meaning under section 1 of title 1, includes a trustee, a representative of an estate and, when the Secretary prescribes, a governmental entity.

(5) "United States" means the States of the United States, the District of Columbia, and, when the Secretary prescribes by regulation, the Commonwealth of Puerto Rico, a territory or possession of the United States, or a military or diplomatic establishment.

(a) In this subchapter—

(1) "domestic financial agency" and "domestic financial institution" apply to an action in the United States of a financial agency or institution.

(2) "foreign financial agency" and "foreign financial institution" apply to an action outside the United States of a financial agency or institution.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 995.)

31 U.S.C. § 5314

§ 5314. Records and reports on foreign financial agency transactions

(a) Considering the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency, the Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency. The records and reports shall contain the following information in the way and to the extent the Secretary prescribes:

(1) the identity and address of participants in a transaction or relationship.

(2) the legal capacity in which a participant is acting.

(3) the identity of real parties in interest.

(4) a description of the transaction.

(b) The Secretary may prescribe—

(1) a reasonable classification of persons subject to or exempt from a requirement under this section or a regulation under this section;

(2) a foreign country to which a requirement or a regulation under this section applies if the Secretary decides applying the requirement or regulation to all foreign countries is unnecessary or undesirable;

(3) the magnitude of transactions subject to a requirement or a regulation under this section;

(4) the kind of transaction subject to or exempt from a requirement or a regulation under this section; and

(5) other matters the Secretary considers necessary to carry out this section or a regulation under this section.

(c) A person shall be required to disclose a record required to be kept under this section or under a regulation under this section only as required by law.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 997.)

(2)

No. 91-1723

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS G. CLINES

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was properly convicted for failing to disclose his capital and investment accounts, held by a Swiss business entity that provides financial services, as financial accounts held by a financial institution?

2. Whether Independent Counsel Walsh had authority to prosecute tax violations arising from petitioner's failure to report the gross receipts resulting in part from sales of arms to Iran and the Contras and his failure to disclose the existence of foreign financial accounts in a financial institution in which his share of the profits was kept?

3. Whether venue was proper for prosecution of income tax reporting violations and failures to file foreign financial account forms in the district in which the returns were prepared and in which the account forms could have been filed?

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 958 F.2d 578.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1992. The petition for a writ of certiorari was filed on April 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of willfully underreporting gross receipts

and falsely stating that he did not have an interest in a financial account in a foreign country on his federal individual income tax returns for 1985 and 1986, in violation of 26 U.S.C. 7206(1), and of knowingly failing to file reports for 1985 and 1986 disclosing to the Commissioner of Internal Revenue an interest in a foreign financial account, in violation of 31 U.S.C. 5314, 5322 and 31 C.F.R. §§ 103.24, 103.26. The district court sentenced petitioner to a term of 16 months of imprisonment and a fine of $40,000.00. The court of appeals affirmed petitioners' conviction. Pet. App. 1a-11a.

1. The evidence at trial established that Thomas Clines hid from the United States Government both the amount of money he made from his role in the Iran/Contra affair in 1985 and 1986 and the fact that he kept large sums of money abroad in two secret accounts, a capital account under the name of T.C. that he maintained with a firm called Compagnie de Services Fiduciaires (CSF), in Geneva, Switzerland, in 1985, and an investment acount in the name of C. Tea that he maintained with that same institution in 1986.

Retired Air Force Major General Richard V. Secord was recruited by Lieutenant Colonel Oliver North, of the National Security Council staff, to supervise a covert operation to provide arms and ammunition to the Nicaraguan Contras. That operation became known as the Enterprise. To carry out the plan, Secord enlisted businessman Albert Hakim, who organized the financial infrastructure of the operation, and petitioner, who assumed responsibility for locating and purchasing weapons abroad and shipping them to Central America. Tr. 160, 162; C.A.J.A. 434, 436. The initial agreement among Secord, Hakim and

petitioner was that petitioner would receive 20% of the profits from each arms shipment, plus expenses. Tr. 161, 167; C.A.J.A. 435, 439.

Hakim turned to CSF to provide financial services to the Enterprise. CSF provided its individual and corporate clients a broad range of financial and investment management services that included assisting clients in the formation of corporations, providing corporate bookkeeping and accounting services, and investing funds received from clients in bonds, securities, and commodities. At Hakim's request, CSF and its chief officer, Willard Zucker, formed 11 shell corporations chartered in Panama, Liberia, or Switzerland for the purpose of collecting money and financing the procurement of weapons. Those corporations included Energy Resources International S.A. and Lake Resources Inc., the principal entities used to receive funds for the project.

During 1985, petitioner's profits from each arms shipment went into the "T.C. capital account" managed by CSF. A total of $373,134 flowed through this account. C.A.J.A. 218, 254. By simply contacting CSF, petitioner could direct the disposition of these funds in any way he wanted: he could (and did) have some of this money wired from his account in Switzerland to the United States; he could (and did) arrange to withdraw some of it in cash; he could (and did) have some of it transferred to a third party for petitioner's benefit. At the same time, petitioner had the option of leaving the money in the T.C. capital account with CSF; CSF kept a running ledger of his balances (including both his surpluses and the debits occasioned when he drew down anticipated profits). Both Secord and Zucker testified at trial that, after alloca-

tion, petitioner's actual control of funds maintained in the T.C. account at CSF was complete.

In 1986, the sale of arms to the Contras continued. At the same time, the sale by the United States Government of arms to Iran generated a new source of funding for the covert Contra arms sales: receipts from the Iran arms sale were used to pay both for the actual cost of weapons provided to the Contras and for the profits from the arms sales reaped by petitioner, Secord and Hakim. In 1986, petitioner's share of the profits increased to 30%. Tr. 174-75, C.A.J.A. 443-44.

In 1986, petitioner opened an investment account with CSF, using the assumed name "C. Tea." Tr. 366, 368, 372; C.A.J.A. 506, 508, 512; C.A.J.A. 208-12. Funds from petitioner's share of the 1986 profits were deposited in the C. Tea account, and were then invested in bonds, securities and foreign currency. C.A.J.A. 219-248. Petitioner earned income of $17,135.10 from funds invested in the C. Tea account during 1986. C.A.J.A. 255.

Beginning in 1982, petitioner used as his accountant Melvyn Leshinsky, who had his offices in Bethesda, Maryland. Tr. 682-83, 685-86; C.A.J.A. 587-88, 590-91. Leshinsky prepared petitioner's 1985 and 1986 federal income tax returns in his Bethesda, Maryland office. Tr. 686, C.A.J.A. 591; Tr. 745, C.A.J.A. 649. Petitioner and his bookkeeper repeatedly met with and corresponded with Leshinsky in Maryland. Tr. 735, 743, 820-21; C.A.J.A. 340, 640, 644, 719-20.

Petitioner's gross receipts in 1985 from Enterprise and non-Enterprise sources were *at least* $468,431.08. He was obligated to list that figure on line 1a of

Schedule C of his 1985 income tax returns. The figure he actually reported, however, was $265,000, C.A.J.A. 123, for a shortfall of *at least* $203,431.08, C.A.J.A. 259. $265,000 represented exactly the amount of money that petitioner brought into the United States from abroad. Gov't C.A. Br. 8. The money that petitioner left abroad was not reported.

In order to conceal the existence of his capital account and thereby conceal his income left abroad, petitioner falsely answered "no" to the question on his 1985 tax return asking whether he had an interest in or authority over a foreign account. In preparing the return, Leshinsky specifically asked petitioner whether he had an account in any foreign country; petitioner informed Leshinsky that he did not have such an account. Tr. 703-04, 815-16; C.A.J.A. 608-09, 714-15.

Petitioner had prior knowledge of the reporting requirements. In 1983, in reviewing petitioner's financial records in the context of an investigation of which petitioner was the subject, Leshinsky found that petitioner had controlled a bank account in Bermuda in 1981, and that, although the due date was past, no report for that account had been filed. Leshinsky then prepared a Form 90-22.1 for that account, Tr. 714-16, C.A.J.A. 619-21, which petitioner filed, C.A.J.A. 187-88; C.A.S.A. 1-4; Tr. 705-708, C.A.J.A. 610-12. The evidence thus showed that petitioner knew that if he had answered truthfully Leshinsky's question to him as to whether he had a foreign account, Leshinsky would have prepared petitioner's Form 90-22.1.

Leshinsky also prepared petitioner's 1986 income tax return. On that return, petitioner listed his gross receipts as $402,513. C.A.J.A. 163. The Government proved at trial that petitioner's gross receipts in 1986

were *at least* $459,522.45, or $57,009.45 more than petitioner reported. C.A.J.A. 253, 255, 259.[1] Thus, the 1986 income tax return, like the 1985 income tax return, falsely underreported petitioner's gross receipts.

The 1986 income tax return also contained a false statement with respect to the question whether petitioner had a foreign account. As he had with respect to the 1985 income tax return, Leshinsky asked petitioner whether he had a foreign account, and petitioner answered in the negative. Tr. 750-52, 815-16; C.A.J.A. 651-53, 714-15. Petitioner never informed Leshinsky of the existence of the C. Tea investment account, which petitioner had maintained during 1986 with CSF in Geneva. Tr. 752-54, 796; C.A.J.A. 653-55, 695. Moreover, while petitioner informed Leshinsky of the interest that he earned on his United States accounts, none of the $17,135.10 that petitioner earned in income from his C. Tea account was reported on his 1986 income tax return. Tr. 754, C.A.J.A. 655.

Petitioner testified at trial. He acknowledged receiving every dollar that the Government charged were his gross receipts in 1985. Tr. 1295-96, C.A.J.A.

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[1] As in the case of 1985, the Government's computation of Clines's true gross receipts for 1986 was extremely conservative. Clines also received a total of $70,000 in other payments from the Enterprise in 1986. C.A.J.A. 253. But since the underlying documents did not clearly establish that these additional funds were profits, they were not included in the Government's computation of the extent of Clines's underreporting. In addition, in 1986 Clines's bank accounts in the United States received by wire transfer $160,000 from unknown foreign sources. C.A.J.A. 258. That money was also not included in the Government's calculation of petitioner's true gross receipts in 1986.

878-79. He testified that the underreporting on his 1985 income tax returns arose from his inability to understand the difference between net and gross income. Tr. 1262, C.A.J.A. 845. He referred to his 1985 capital account as his "profit account," Tr. 1220, C.A.J.A. 803, but said he did not believe it was reportable, Tr. 1302, C.A.J.A. 885. He nonetheless acknowledged that he had control over the funds in his capital account once they had been allocated to him and that the statement of gross receipts on his original 1985 income tax return "is not correct." Tr. 1305, C.A.J.A. 888. He also admitted that the answer on Schedule B of his 1986 income tax return stating that he did not have a foreign account "is incorrect." Tr. 1306, C.A.J.A. 889.

Petitioner called his former attorney, who testified that, after petitioner became a focus of the investigation in the Iran/Contra matter, petitioner filed an amended 1985 tax return reporting additional gross receipts. In explaining his underreporting of his gross receipts, petitioner told his attorney that he had not understood the difference between net and gross income. Tr. 1147-48.

2. The court of appeals affirmed. Pet. App. 1a-11a. In the court of appeals, petitioner raised two claims. First, he contended that he could only be prosecuted for failure to file reports of foreign financial accounts in the jurisdiction where the Treasury Department had a post office box to which the form should have been forwarded.[2] The court of appeals found that venue was proper in Maryland because of

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[2] For the 1985 form, the Treasury post office box was in Memphis, Tennessee. The Treasury post office box for the 1986 form was in Detroit, Michigan. Pet. App. 10a n.2.

petitioner's contracts with the state—in particular, his accountant worked there and prepared petitioner's 1985 and 1986 tax returns there—and because prosecution in Maryland did not impose improper hardships on petitioner.

Second, petitioner challenged his conviction for failing to file a report of a foreign financial account maintained in 1985 and his conviction for making false statements on his 1985 income tax returns on the ground that he had no obligation to report the TC capital account. Rejecting that claim, the court of appeals found that that account was covered by the reporting requirement. Pet. App. 7a-9a.

In the court of appeals, petitioner did not contest his conviction for making false statements on his 1986 income tax return.

ARGUMENT

Virtually all of petitioner's arguments were not raised below and are thus not properly before this Court. None of his arguments warrants review by this Court, and all are at odds with well-established substantive law.

1. Petitioner first contends that the statutory and regulatory reporting requirements concerning the disclosure of financial accounts maintained at foreign financial institutions were impermissibly vague, Pet. 13-17, and that, because the trial court refused to give petitioner's proffered instruction concerning financial institutions, the jury could not have properly concluded that he acted willfully, Pet. 17-19.

a. Petitioner apparently concedes that CSF was a "financial institution" within the meaning of the relevant form, regulation and statute. Similarly, he

apparently concedes that the T.C. capital account (used during 1985) and the C. Tea investment account (used during 1986) were financial accounts within the meaning of the relevant form, regulation and statute. Pet. 16. Moreover, he does not point to any ambiguity in the relevant definitions that the form, regulation and statute provide. Petitioner's argument appears to be that the terms "financial account" and "financial institution," as they are used and defined in the relevant form, regulation and statute, are inconsistent with the way in which a lay person who did not consult the relevant form, regulation and statute would define those terms, and that, as a result of that purported inconsistency, the tax return and the reporting form are impermissibly vague. See, *e.g.*, Pet. 14-15.

Initially, further review is unwarranted because petitioner's vagueness claim was neither raised in nor passed on by either court below. In the court of appeals, he mounted no challenge of any kind bearing on the 1986 investment account, explicitly conceding that that account was reportable. See, *e.g.*, Pet. C.A. Reply Br. 3 ("Mr. Clines concedes that the 1986 'C. Tea' account fell within the reach of the reporting requirement.") With respect to the 1985 account, he claimed that the T.C. account was not a reportable financial account at a financial institution, as those terms are defined in the relevant form, regulation and statute. He did not claim that the definitions of those terms were void for vagueness. Nor did he claim in the trial court that those terms were void for vagueness. Accordingly, petitioner ought not be permitted to raise his vagueness challenge for the first time before this Court. *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1531 (1992). *Delta Air Lines* v. *August*, 450 U.S.

346, 362 (1981); *United States* v. *Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

In any event, petitioner's vagueness argument is mistaken. First, as that portion of the court of appeals' decision which held that CSF was a financial institution and that petitioner maintained an account there indicates, Pet. 7a-8a, the definitional language of the relevant statute 31 U.S.C. 5312(a), and regulation, 31 C.F.R. § 103.11(e), is very specific.[3] Petitioner does not claim that this definitional language is ambiguous or otherwise lacking in clarity.

Second, this Court has held that, "Objections to vagueness under the Due Process Clause rest on the

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[3] Petitioner sets out the the statute himself. Pet. 6-8. The relevant portion of the statute has 21 subsections delineating entities and individuals that qualify as financial institutions, as well as activities, whether engaged in by entities or individuals, that bring them within the statute's coverage. Petitioner also notes that the definitions in the statute and in the regulation are much the same. Pet. 10. See also Gov't. C.A. Br. Add. vi-xi. Each term within the statute has either a common-sense meaning or refers to the definitional section of other statutes; the regulatory language adds more detail. Petitioner does not explain which definitions were unconstitutionally vague, nor does he challenge the holding of the court of appeals that the account was held by a financial institution within the meaning of at least 4 of the statutory and regulatory definitions. Pet. App. 7a-8a.

It should be added that petitioner mischaracterizes the court of appeals' decision. Petitioner indicates that the court of appeals found that Energy Resources was a financial institution. Pet. 16. In accordance with the Government's theory of the case, however, the court of appeals found that the financial institution was CSF, and it did not address the question whether Energy Resources was itself also a financial institution. Pet. App. 7a-8a.

lack of notice, and hence may be overcome in any specific case where reasonable persons would know their conduct is at risk." *Maynard* v. *Cartwright*, 486 U.S. 356, 361 (1988). See also *United States* v. *Ragen*, 314 U.S. 513, 524 (1942) ("A mind intent upon willful evasion is inconsistent with surprised innocence.") That standard is easily satisfied here. Petitioner, an international businessman, had experience with the foreign financial account reporting requirement, having filed such a form for 1981. Tr. 705-08, C.A.J.A. 610-12.[4] Petitioner did not disclose to his accountant—and did not pay taxes on—the money that he was able to keep abroad by using the T.C. capital account and the C. Tea investment account. Gov't C.A. Br. 10. Nor did he disclose to the accountant the investment income that he had earned from the C. Tea investment account. Gov't C.A. Br. 20-21. The evidence that petitioner knew his behavior was at risk was overwhelming.

b. Petitioner maintains that the jury could not have properly determined that he acted willfully, since the trial judge did not give the jury the instruction that petitioner requested defining "financial institution." Pet. 17-19. Petitioner's claim seems to be based on the trial court's refusal to give the following requested instruction:

> For purposes of this case, financial institutions include banks, brokers, or dealers in securities, currency dealers, and licensed transmitters of funds. I specifically instruct you that during the

[4] Petitioner argues that his filing of the form in 1983 suggests that he would have filed the relevant forms in 1985 and 1986 if he had believed he was obligated to file them. Pet. 20. Of course, the jury's verdict demonstrates that it rejected that conclusion.

> year 1985 neither Energy Resources nor Lake Resources was a financial institution within the meaning of the regulations.

Letter from Paula Junghans, Esq. to the Honorable Norman Ramsey, September 17, 1990, at 2.

The trial court instructed the jury that, with respect to all the crimes with which petitioner was charged, it had to determine that he acted willfully in order to convict him. Tr. 1533, 1537-41, 1543, 1545; C.A.J.A. 1104, 1108-12, 1114, 1116. Petitioner does not now maintain that the willfulness instruction as given was wrong. Moreover, the jury was instructed that:

> The government must prove that the defendant had either, one, a financial interest in a foreign financial account, or, two, signature or other authority over a foreign financial account. The government need not prove both.
>
> A financial account means an account maintained with a financial institution or other person who accepts deposits, exchanges or transmits funds.

Tr. 1544, C.A.J.A. 1115. Petitioner fails to explain how that instruction meaningfully differs from the one he sought.

Finally, petitioner was not barred from arguing to the jury about the meaning of the term "financial institution," as the full colloquy, from which his petition quotes an excerpt, Pet. 19, reveals:

> Ms. Junghans: . . . . I think you have to tell the jury what a financial institution is and that is defined in the regulations as a bank, a casino.
>
> The Court: I'm not going to throw it into the charge. You can get the 4th Circuit to direct me to do it.

> Ms. Junghans: It is on the form, I can look to the form that is in evidence.
>
> The Court: The form is in evidence. Read any document you want to that is in evidence . . . .

Tr. 1451, C.A.J.A. 1022. See also Tr. 1547, C.A.J.A. 1118.

Petitioner's willfulness claim is thus not supported by the only decision of this Court that he invokes, *Cheek* v. *United States*, 111 S. Ct. 604 (1991). There, the trial court instructed the jury "to disregard evidence of Cheek's understanding that, within the meaning of the tax laws, he was not a person required to file a return or to pay income taxes and that wages are not taxable income . . . ." 111 S. Ct. at 611. The trial court did not instruct the jury to disregard evidence of lack of willfulness. The jury was, in fact, fully instructed with respect to petitioner's defenses and permitted to consider them.

2. Petitioner's second question—whether Independent Counsel had authority to prosecute tax violations and currency reporting failures—was neither presented to nor passed upon by the court of appeals. It is therefore not properly before this Court. *Yee* v. *City of Escondido*, 112 S. Ct. at 1531; *Delta Air Lines* v. *August*, 450 U.S. at 362.

In any event, petitioner's claim is mistaken. Independent Counsel's authority to prosecute such violations was properly decided by the district court. That ruling fully comports with the only other decision in which the issue was raised. In *United States* v. *Secord*, 725 F. Supp. 563 (D.D.C. 1989), the trial court held that Independent Counsel had authority to prosecute perjuries before Congress because the "alleged perjury before Congress[] 'arose from' and was 'related to'

the subject matter of the Independent Counsel's jurisdiction . . . ." *Id.* at 565. In this case, the trial court followed the same logic, holding that, "crimes involving the attempt to hide arms sale profits meet the standard of a 'violation of *any* federal criminal law . . . *relating in any way to*' the sale of arms to Iran and the diversion of funds to the Contras. These crimes also fall into the category of 'a violation of *any* federal criminal law . . . *arising out of* such events.' " *United States* v. *Clines*, No. R-90-0064, slip op. at 3 (D. Md. Aug. 23, 1990) (emphasis in original).

Both rulings are based on a common-sense reading of the order appointing Lawrence E. Walsh Independent Counsel by the United States Court of Appeals for the District of Columbia Circuit Division for the Purpose of Appointing Independent Counsels, which provides for the "maximum" investigative jurisdiction allowed under 28 U.S.C. 594. C.A.J.A. 39-41. The order specifies 5 paragraphs of principal events that constitute the basis for the investigation—including direct or indirect sales of arms to Iran or *any* intermediary acting for Iran, the financing of any part of such transactions, and the "provision or coordination of support" for the Contras. Independent Counsel's investigative jurisdiction extends to any crimes "connected with or arising out of that investigation" and its prosecutorial jurisdiction extends to "any person[] . . . who [is] reasonably believed to have committed a violation of any federal criminal law . . . arising out of such events . . . ." Failing to report the gross receipts from the sale of arms to the Contras and failing to report the account in which his share of the profits from those sales were kept plainly "arise from" or "relat[e] in any way to" the princi-

pal events to be investigated.[5] *Cf. Shaw* v. *Delta Air Lines*, 463 U.S. 85, 96-99 (1983) (unless good reason exists to believe Congress intended otherwise, the phrase "relates to" must be construed in its normal, broad sense).

3. Petitioner claims that venue was improperly laid in the District of Maryland.[6] That claim is

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[5] Petitioner also suggests that Independent Counsel's prosecution of him was inconsistent with established Department of Justice policies. Pet. 23. This is incorrect. First, petitioner did not file an amended tax return for 1985 until *after* Congressional investigators began inquiring about his arms sale profits. Indeed, the evidence at trial showed that, in an attempt to gain immunity from Congress, petitioner submitted a false affidavit in which he claimed—untruthfully—that *all* of his arms sale profits had been properly reported on his tax returns. Even at that point, petitioner still filed a false 1986 tax return, made no disclosure of his foreign financial accounts, and, even when he ultimately amended his 1985 tax return, petitioner paid no additional taxes, instead offering the completely unsubstantiated claim that all of the unreported receipts had been used to pay expenses. Thus, under no stretch of the imagination would petitioner's belated amendment of his 1985 return have immunized him from prosecution under Department of Justice policy. See U.S. Department of Justice, *Criminal Tax Manual*, § 4.01. Petitioner's reference to misdemeanor pleas is also wrong. Department of Justice policy expressly disapproves of misdemeanor dispositions in tax cases except in extremely unusual circumstances not applicable here. *Id.* at § 16.03.

[6] Since his venue challenge in the court of appeals was limited to the counts involving failure to file reports of foreign financial accounts, his challenge to venue is so limited in this Court as well. *Yee*, 112 S. Ct. at 1531. It is clear, however, that venue was proper on the other counts since venue in prosecutions for making false statements on income tax returns lies where the returns were prepared. See, *e.g.*, *United States* v. *Rooney*, 866 F.2d 28, 30-32 (2d Cir. 1989);

mistaken. The reporting form specifically provides that the form may be filed with "any local office of the Internal Revenue Service," Form 90-22.1,[7] and the law is clear that prosecution in the District of Maryland is appropriate because there is a local IRS office in Maryland at which petitioner could have filed the form. As the court of appeals held:

> The situs of a crime consisting of a failure to act is the place fixed for performance of the act. *Johnston* v. *United States*, 351 U.S. 215 (1956). The crime of failure to file returns is committed in the district or districts where the taxpayer is required to file the returns. *United States* v. *Garman*, 748 F.2d 218 (4th Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985).

Pet. App. 9a-10a.[8] Prosecution in Maryland was also consistent with petitioner's Sixth Amendment rights.

United States v. *Slutsky*, 487 F.2d 832, 839 (2d Cir. 1973), *cert. denied*, 416 U.S. 937 (1974); *United States* v. *Marchant*, 774 F.2d 888, 891 (8th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986).

[7] Instruction C of the form, Report of Foreign Bank and Financial Accounts, 90-22.1, for 1985 reads:

> C. When and where to File—This report shall be filed on or before June 30 each calendar year with the Department of the Treasury, Post Office Box 1918, Memphis, TN, 38101, or it may be hand carried to any local office of the Internal Revenue Service for forwarding to the Department of the Treasury, Memphis, TN.

For 1976 the form differed only in that it specified a mailing and forwarding address in Detroit, Michigan. C.A.S.A. 5-8.

[8] Petitioner cites only *United States* v. *Greene*, 862 F.2d 1512 (11th Cir.), *cert. denied*, 493 U.S. 809 (1989) for the proposition that the Fourth Circuit's rule is "opposite in application to other decisions of other Circuits." Pet. 25. In fact, *Greene* applied precisely the continuing offense stat-

Petitioner's accountant had offices in Maryland and his 1985 and 1986 income tax returns were prepared there, and petitioner and his bookkeeper met with and corresponded with the accountant in Maryland. Maryland was thus the site of relevant events and of relevant evidence. Since petitioner lived in Virginia, prosecution in Maryland involved no personal hardship. Prosecution in Maryland thus comported with the Sixth Amendment's ends of avoiding unfairness and hardship and promoting evidence-gathering. See *United States* v. *Cores*, 356 U.S. 405, 407 (1958); *Travis* v. *United States*, 364 U.S. 631, 640 (1961) (Harlan, J., dissenting).[9]

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ute relied on by the Government, 18 U.S.C. 3237(a), to a set of facts that almost precisely parallel those here at issue—preparation of a fraudulent loan application in a district from which it was not mailed. The Eleventh Circuit held that venue was proper "where he completed the false application and where he communicated with [his tax shelter advisor]." 862 F.2d at 1516.

[9] Petitioner's suggestion that this prosecution was brought in Maryland because of forum-shopping by the Government, Pet. 28, is groundless, as the court of appeals noted, Pet. App. 10a n.3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfuly submitted.

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No. 91-1723

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THOMAS G. CLINES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a taxpayer can be convicted of wilfully failing to disclose a "financial account in a foreign country" on his federal income tax return and failing to file a report disclosing said interest where the applicable laws, regulations, judicial opinions and tax return instructions are ambiguous regarding the definition of a "financial account" and "financial institution?"

2. Whether Independent Counsel Lawrence Walsh had the legal and constitutional right to prosecute Petitioner for tax violations for failing to disclose a "financial account in a foreign country" as a result of the Independent Counsel's general appointment to investigate certain events of the "Iran-Contra Affair?"

3. Whether a taxpayer who is a citizen and resident of the State of Virginia for 40 years, who has continuously filed returns and forms by mail from his home to the IRS, can be tried in the District Court for Maryland for violations relating to his income tax returns and for failing to file related Treasury Forms?

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REPLY BRIEF OF PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-11a) is reported at 958 F.2d 578.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1992. The petition for a writ of certiorari was filed on April 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner disputes the factual conclusions presented by Respondent, United States of America. The Statement is replete with inaccuracies and exaggerations:

1. Respondent claims Petitioner "hid" from the United States Government the fact that he made money in the

Iran/Contra Affair. B.I.O.[1] at 2. There is no record citation for this conclusion. There was no evidence that Petitioner "hid" his funds. Petitioner worked merely as a functionary. TR. 765.[2] Petitioner deposited his money in a United States bank by wire transfer in full view of the U.S. Government. TR. 184, 1218.

2. Respondent claims that Petitioner maintained two "secret" accounts in Switzerland. There is no record citation. It is untrue. The so-called "capital account" was nothing more than an account payable owed to Petitioner *by* CSF, a company run by one man (Willard Zucker). To the extent that a private enterprise account payable is "secret" or non-public, then it was. Commonly, most accounts payable in business enterprises are non-public. TR. 196, 209, 1219.

3. Respondent claims that Petitioner directed the funds in the capital account. B.I.O. at 3. However, the evidence, uncontradicted, established that the control of the accounts, the organization of the enterprise, the ownership thereof, was in the hands of Zucker (who was CSF), Hakim and Secord. Petitioner, was simply an employee. TR. 196, 206, 1215.

4. Respondent omits to mention Petitioner's Amended Return (which was begun *before* any investigation) in an attempt to characterize Petitioner as a tax cheat. See B.I.O. at 5. This was *not* a tax evasion case.

5. Petitioner did not consider (nor would the average taxpayer) an account payable as a "financial account in a foreign financial institution."

6. The Government contends that the amended returns were also inaccurate in their statement of gross receipts. The Government admits that Petitioner was an intermediary for other foreign funds. B.I.O. at 6. However, the record is entirely unclear as to the amount of gross

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[1] "Brief of Respondent, United States of America, in Opposition to the Petition for Certiorari" filed May 27, 1992.

[2] "TR." is Transcript of Trial.

receipts and expenses attributable to Clines because of the nature of Clines' activities. Moreover, the government's case was not for tax evasion, but for failure to report a foreign financial account.

7. The Government contends that "Petitioner opened an account with CSF". B.I.O. at 4. There was no evidence that Petitioner opened anything. TR. 196, 206. Mr. Zucker opened an account and labeled it "C.Tea." There was no evidence that Petitioner did anything to "open" or characterize the account.

8. The Government contends that Petitioner, who filed his tax returns from Virginia (where he lived) "repeatedly" met and corresponded with his accountant in Maryland. The Government ignores Mr. Clines residency and the fact that he met with his accountant many times in the District of Columbia and in Virginia and that Clines completed the returns in Virginia. TR. 787, 789.

9. The Government contends that Mr. Clines lied to his accountant regarding a foreign "account." B.I.O. at 5. There was no such evidence.

10. The Government contends that Petitioner had prior knowledge of the reporting requirements. B.I.O. at 5. This is true. When he had a foreign bank account, he reported it. See Petitioner's lodging materials, page 11. TR. 707.

11. The Government contends that Petitioner lied about his gross receipts. B.I.O. at 6. The evidence demonstrated that what gross receipts were and were not properly includable in his income was confused and complicated. TR. 210, 765. Petitioner was used as a intermediary for the movement of Enterprise funds, and expenses. TR. 162. Mysterious deposits from foreign sources were deposited in Petitioner's accounts. An army of IRS accountants had to work months to try to straighten out the accounting mess. To this day no one can tell with certainty what was and was not Petitioner's money. TR.

219, 223. The Government simply chose to conclude that Clines should be attributed with all of it.

12. The Government omits to state that one of the owners of the CSF funds, Richard Secord, a *Government witness*, testified that the books and records presented by the Government to establish the gross recipts of and attributed profits to Mr. Clines, were "cooked" or false. TR. 210, 211, 219. Mr. Zucker admited that the documents were "recharacterized."

ARGUMENT

I. THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

A. Vagueness of the Instruction on the Tax Return Form.

The Government contends that Petitioner should not be able to raise his attack on the convictions based upon unconstitutional vagueness, because that argument was not precisely made below. The Government cites *Yee v. City of Escondido, Cal.*, 112 S.Ct. 1522 (1992). The Government concedes that Petitioner vigorously attacked the language of the tax return question on the Form 1040 the Treasury Form T.D. 90-22.1 and statute in both the Trial Court and the Court of Appeals.

Yee, supra, confirmed the ability of a Petitioner to refine or reframe his arguments, provided the claim was made below. *Id*; 112 S.Ct. 1522 at 1532. Moreover, this Court has repeatedly held that in cases arising from federal courts, the non-review rule is prudential only. See, e.g. *Carlson v. Green*, 446 U.S. 14, 17, n. 2, 100 S.Ct. 1468, 1490, n. 2. (1980).

Clearly, this Court can, and should review the question. Inherent in the ease with which the Fourth Circuit fit the facts within the statute and regulations, was a determination that the tax return, the form, and the

statute were clear, and unambiguous. In fact, the Court held the terms were "broadly defined."

This court, can, if it wishes, review the arguments raised by Petitioner. On occasion this Court has even considered, and corrected, error *not raised*, by a Petitioner. See *Nixon v. Fitzgerald*, 457 U.S. 731, n. 23 (1982).

The Government contends that Petitioner must concede that the activities of which he was found guilty, fit easily within the regulatory and statutory scheme. B.I.O. at 9. Petitioner concedes nothing of the kind here. It is true, however, that Petitioner's counsel in the Court below did concede that in 1986 only, the money owed Petitioner could arguably fit within the regulatory definitions. That concession affected Count II of the Indictment only. See Pet. App. at 5a. That concession was unfortunate, inappropriate, and inaccurate.

However, whether or not lawyers could easily fit "accounts payable" into the broad definitions approved by the lower court, the fact remains that the Tax Form must be viewed from the perspective of the ordinary, reasonable taxpayer. From that view, it is unconstitutionally vague. *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855 (1983).

The Government supports its defense of the clearly vague tax form by contending that the complex statute and regulations are very specific and yet all-inclusive. Even a cursory review demonstrates, however, that the terms used on the tax form ("bank account, securities account or other financial account") are misleading. Moreover, even the instructions on the Form TD 90-22.1 (which follows after the Tax Form questionnaire) are ambiguous as to what is, precisely, a "financial institution."

The Government supports the convictions based upon the tax form trap by pointing to Petitioners past experi-

ence with Form TD 90-22.1.[3] (See Petitioner's Lodging Materials, page 11.) Petitioner filed the form when he had a foreign bank account—clearly a foreign "financial institution" in the common parlance.

B. Willfulness.

The Government contends that by charging the jury on the standards of willfulness, the error in the jury instructions was cured. B.I.O. at 12. It was easy for the jury to find "willfulness" when the judge instructed them that the account was a "foreign financial account in a financial institution." See Pet. App. at 37a. It was also grievous, prejudicial error.

The trial court never told the jury what the terms on the form meant. It was an incomplete instruction. While the Court gave complete, elaborate definitions of "willfulness," the equally important terms which had legal criminal significance, were unfortunately left vague and undefined. See, *United States v. Gamber*, 607 F.2d 92 (5th Cir. 1979).

II. INDEPENDENT COUNSEL WALSH HAD NO AUTHORITY TO PROSECUTE THOMAS G. CLINES FOR INCOME TAX VIOLATIONS AND FAILURE TO FILE TREASURY FORMS.

The Government's only response[4] to Petitioner's arguments is that the tax return and treasury form viola-

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[3] The government contends here that the Petitioner did not "pay taxes" on his income. B.I.O. at 11. This was not a tax evasion case. That matter is hotly disputed in Tax Court. Indeed, as the Trial Court charged the jury:

> "Mr. Clines is not charged with understating his total liability nor is there any criminal charge relating to whether or not he paid any amount of tax due for the years 1985 and 1986."

[4] In a footnote at B.I.O. Page 15, the Government makes certain uncharged accusations, unsupported by the record, about alleged false affidavits to Congress. Suffice it to say that if there was a basis to such charges, Mr. Clines surely would have been indicted for them.

tions "arose" out of or "relate to" the sale of arms to Iran and to the Contras. Mr. Walsh argues that it is limitless.

The District Court in *United States v. Secord*, 725 F. Supp. 563 (D.D.C. 1989), considered the limits of jurisdiction of Mr. Walsh. While it found those areas wide, there *are* outer boundaries. The Court opined:

> In permitting the Independent Counsel to prosecute crimes "arising out of" the Iran-Contra events, here Defendant's alleged perjury, the Special Division fell well within the standard of section 593(b)(3), as clarified by the Court. Just as Defendant's conduct "arose out of" the sale of arms to Iran and the diversion of proceeds, it is "demonstrably related" thereto. To demonstrate that one occurrence is "related" to another, one need only show that there is a reasonable causal or logical connection between the two, some tenable correlation between the events.
>
> That connection is present here. The congressional investigation, the questions directed at Defendant and Defendant's answers all bear an undeniable factual relationship to the events giving rise to the appointment of the Independent Counsel. This relationship is strengthened by the congressional investigation's temporal and logical connection to the events, see discussion supra, at 564-65. Once again, the Independent Counsel could reasonably view the actions of General Secord as simply an additional part, another component of the crimes for which he and three others were originally indicted.
>
> By supplying the example of Defendant's future copyright violation in writing his Iran-Contra memoirs, Defendant argues that even the most attenuated factual relationship would permit a prosecution. Precisely the opposite, however, is true. The Supreme Court in *Morrison* called for more than a relationship between the events which is stretched far over time and factually suspect. The relationship must be "demonstrable," that is, something which is evident

> initially and without great leaps of logic. The courts are routinely called upon to draw lines, and this simply is another of those cases.

It does seem inconceivable, however, that a private employee's failure to check a box and income tax form was the type of case Congress expected to be pursued by an Independent Counsel.[5]

The tenuous relationship to Iran/Contra especially in view of what was supposed to be investigated is startling. Under this theory, anyone of the hundreds of people working in any capacity or status could be targeted. Clearly, this is not what Congress intended by the so-called "limited jurisdiction" of the Independent Counsel.

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[5] This Court did not apparently expect it either. Indeed, this Court in *Morrison v. Olson*, 108 S.Ct. 2597 at 2609 (1988) stated:

> Third, appellant's office is limited in jurisdiction. Not only is the Act itself restricted in applicability to certain federal officials suspected of certain serious federal crimes, but an independent counsel can only act within the scope of the jurisdiction that has been granted by the Special Division pursuant to a request by the Attorney General. Finally, appellant's office is limited in tenure. There is concededly no time limit on the appointment of the particular counsel. Nonetheless, the office of independent counsel is "temporary" in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated, either by the counsel herself or by action of the Special division. Unlike other prosecutors, appellant has no ongoing responsibilities that extend beyond the accomplishment of the mission that she was appointed for and authorized by the Special Division to undertake. In our view, these factors relating to the "ideas of tenure, duration . . . and duties" of the independent counsel, *Germaine*, supra, 9 Otto, at 511, are sufficient to establish that appellant is an "inferior" officer in the constitutional sense.

III. THE FOURTH CIRCUIT COURT OF APPEALS DECISION DENYING PETITIONER HIS STATUTORY AND CONSTITUTIONAL RIGHT TO A TRIAL WHERE THE PETITIONER RESIDED AND THE RELEVANT CIRCUMSTANCES SURROUNDING THE CONTESTED ISSUES WERE LOCATED, CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The Government completely ignores 18 U.S.C. § 3237(b) which is directly applicable to this case, was not waived, and required prosecution in Petitioner's state of residence. The Governnment also completely ignores the fact that the venue issue was required to be submitted to the jury, and was not.[6] See *Green v. United States*, 309 F.2d 852, 856-57 (5th Cir. 1962).

Yet the Government incredibly claims that since Form 90-22.1 could be filed in any local office of the Internal Revenue Service, and since Maryland has a local office, Petitioner could be dragged there. This argument would give the Government nationwide venue, since every state (and even foreign countries) has a local IRS office. B.I.O. at 16. There is nothing to suggest Congress intended nationwide venue. See *United States v. Yeuse*, 387 F.Supp. 132, 134 (E.D.Wis. 1975).

In the very next sentence, the Government contends that this "nationwide" venue argument is also "consistent" with Petitioner's Six Amendment rights. This, of course, is inconceivable and at odds with well established law. See *United States v. Anderson*, 66 S.Ct. 1213, 328 U.S.

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[6] *United States v. Rooney*, 886 F.2d 28 (2d Cir. 1989) does not assist the Government. There the taxpayer filed the return from a district in which he did not live or work. His venue argument was clearly artificial and contrived. The taxpayer and his accountant in fact worked and resided in the same district, where the false return was prepared and where he was correctly tried. Here Clines lived for 40 years in Virginia, the IRS considered it his tax base, and he filed from Virginia, where the returns were completed. That is also where he could have filed a T.D. 90-22.1.

699 (1946); *Johnson v. United States*, 351 U.S. 219 at 221, 76 S.Ct. 739 at 743 (1956); *United States v. Johnson*, 323 U.S. 273 at 274, 65 S.Ct. 249 at 250 (1945).

CONCLUSION

The Petition for Certiorari should be granted.

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